INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

LAGRAND CASE

(GERMANY *v.* UNITED STATES OF AMERICA)

VOLUME II

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE LAGRAND

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

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(GERMANY *v.* UNITED STATES OF AMERICA)

Affaire LaGrand
(ALLEMAGNE *c.* ÉTATS-UNIS D'AMÉRIQUE)

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This case, entered on the Court's General List on 2 March 1999 under number 104, was the subject of a Judgment delivered on 27 June 2001 (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466).

The documents relating to the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures; Memorial of Germany.
Volume II. Memorial of Germany *(continuation)*; Counter-Memorial of the United States of America.
Volume III. Counter-Memorial of the United States of America *(continuation)*; Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2012.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 104 le 2 mars 1999, a fait l'objet d'un arrêt rendu le 27 juin 2001 (*LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 466).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant :

Volume I. Requête introductive d'instance ; demande en indication de mesures conservatoires ; mémoire de l'Allemagne.

Volume II. Mémoire de l'Allemagne *(suite)* ; contre-mémoire des Etats-Unis d'Amérique.

Volume III. Contre-mémoire des Etats-Unis d'Amérique *(suite)* ; comptes rendus d'audience.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement* ; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les Parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite ; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les Parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios : outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2012.

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MEMORIAL OF GERMANY

MÉMOIRE DE L'ALLEMAGNE

LAGRAND CASE
(Germany v. United States of America)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

Volume III

(Annexes MG 38 - 61)

16 September 1999

Annex MG 38

PRESS CONFERENCE OF THE U.S. STATE DEPARTMENT
(3 MARCH 1999)

do you think this was a target for that area, where they knew that foreigners could be?

MR. FOLEY: Based on the limited information we have thus far - it would look as though the latter scenario were the case; namely, that these rebels deliberately marched into Southwestern Uganda with the deliberate intent to sow terror among Western tourists -- perhaps, to discourage Western tourists from traveling to that part of Uganda. After all, the rebels have opposed the authorities in Uganda, as well, because of Uganda's support for Rwanda, Uganda's involvement in the internal conflict in the Democratic Republic of Congo.

It looks at this point, Betsy, to have been a deliberate act. I have no information that events inside Congo had pushed them in that direction, no.

QUESTION: Jim, could I switch to another law enforcement matter? Have you seen that the German government has issued an appeal to the International Court of Justice in the case of one of the Lagrand brothers in Arizona. Was the State Department at all involved in that process?

MR. FOLEY: Yes, I've seen that report. The case involves, as you say, Walter Lagrand, who is one of two brothers who committed murder during a 1982 bank robbery in Arizona. Both were convicted and sentenced to death, and Lagrand's brother was executed on February 24. Walter Lagrand's execution is scheduled for today in Arizona.

Germany is involved in this case because the two brothers were born in Germany and are German nationals, although they came to the United States as small boys, and lived here throughout their lives. Germany filed suit in the International Court last night on the grounds that the two brothers should have been advised that German consular officials could be notified of their arrest and detention.

The requirement for giving this advice to foreign nationals is set forth in the Vienna Convention on consular relations. Germany asks, among other things, that Walter Lagrand not be executed, pending the court's final decision in the case.

The Department of State has transmitted a copy of the papers filed with the court to the governor of Arizona. We understand that the governor has decided to proceed with the execution, assuming that it is not stayed by the US Supreme Court.

QUESTION: Does the State Department take a position, other than simply transmitting the documents?

MR. FOLEY: No, we have not. We simply transmitted the documents.

QUESTION: Could I ask one more Uganda question? Can you give us an idea of how serious a threat this is to the economy of Uganda, whether this particular tourist site brought in a lot of money for that government?

MR. FOLEY: Well, I don't have those statistics; perhaps the Ugandan Embassy might have that for you. We have, for our part, issued a Public Announcement, warning American citizens not to travel to that part of the country, pending further clarification of the situation there. When you have an incident - and we've not had one like this in that park - when something like this takes place, then we owe it to American citizens to warn them not to travel there any longer.

How long that warning would remain in effect would depend on events to follow: on the assessment of the threat, the assessment of what measures the authorities are putting in place -- not only to chase down the perpetrators, but to ensure that region becomes more secure and such events cannot happen again. It's difficult to forecast when we'll be able to revise our warning in that regard.

MR. FOLEY: Only that they are expected to resume this afternoon. I don't have any specific read-out as to how they're going. You won't be surprised.

QUESTION: But they will resume this afternoon?

MR. FOLEY: They are expected to resume this afternoon; that's what I was informed earlier.

QUESTION: As far as the North Korean delegation, do they have plans to go elsewhere?

MR. FOLEY: Well, there was some apparent plan on their part to travel to Iowa, today and possibly tomorrow. Let me get that for you here, because I have that information.

QUESTION: Iowa?

MR. FOLEY: Yes; let me explain. I will explain.

QUESTION: (Inaudible.)

(Laughter.)

MR. FOLEY: Very good, Charlie, it's not too early, is it?

We were aware of plans for the North Korean delegation to travel to Iowa to attend a Stanley Foundation program on conflict resolution. I would have to refer you to their delegation for details about their decision to change plans. It looks like, instead of going there, they may be staying here -- in New York. As I said, the negotiations may be resuming this afternoon.

We were prepared to have a break in the talks for a couple days, and to resume on Saturday, if they had gone to Iowa, or if they wind up going to Iowa.

QUESTION: Stanley Foundation program for conflict?

MR. FOLEY: For conflict resolution, yes.

QUESTION: Have you seen the remarks by the German Foreign Minister about the Lagrand case? This is the German-born person who was executed yesterday.

MR. FOLEY: I've not seen the remarks. I was told orally, briefly, about them. Walter Lagrand was executed by Arizona for murder during a 1982 bank robbery. The execution occurred only after he had exhausted numerous avenues of judicial review, in both the state and federal court systems. We respect the constitutional authority of Arizona to proceed with the execution, once all legal avenues had been pursued.

As you know, the Department of State yesterday transmitted a copy of the World Court order to the governor of Arizona, as requested by the Court. I would remind you, though, that the German suit in the International Court came at the very last moment of this process, and followed a very long process in the US legal system. The Court also, notably, issued its order without holding a hearing, or giving the United States an opportunity to respond. By the time we received the order, there was no reasonable opportunity for us to take any further action, except to transmit rapidly the copy to the governor of Arizona.

Germany has known about the consular notification issue for a number of years, but did not raise it with us until quite recently. We have not fully investigated the case, but the facts available to us suggest no reason to believe that the Lagrands did not receive due process, or that they were prejudiced by any

Annex MG 39

KEITH HIGHET, "THE EMPEROR'S NEW CLOTHES: DEATH ROW APPEALS TO THE WORLD COURT? THE BREARD CASE AS A MISCARRIAGE OF (INTERNATIONAL) JUSTICE", IN *ESSAYS* IN MEMORIAM *OF JUDGE JOSÉ MARIA RUDA* (FORTHCOMING)

Contribution by Keith Highet for the Book in memoriam for Judge José Maria Ruda

THE EMPEROR'S NEW CLOTHES

Death Row Appeals to the World Court?
The *Breard* Case As a Miscarriage of (International) Justice.

It is with sadness, still felt at a distance of some five years, that I write these words in memory of a friend and colleague who I dearly wish were still with us. I also feel much honor and deep gratitude at having been invited by the Committee to contribute to the book in memoriam of the late Judge Ruda.

As a diplomat, scholar, and judge, José Maria Ruda was long concerned with the impact of international law on our domestic polity, and the harmonization of the legal systems of the Americas. His service in the United Nations in its early years, his subsequent diplomatic service in connection with the Vienna Conventions on Consular Relations and the Law of Treaties, and his long experience as a judge of the International Court and its President — all these stages in his professional career were concerned with the difficulties of integrating national systems and the international order, the undertakings of States in relation to international instruments and institutions, and the collective expectations of the international community. Indeed, in the *ELSI* case,[1] in which Judge Ruda served as President of the Chamber, issues of the interrelationship of the domestic laws and legal processes—and international obligations under a bilateral treaty between nation-States—were at the very forefront of the litigation.

Judge Ruda would, I know, have been most alert to the recent developments in relation to the Vienna Convention on Consular Relations.[2] These developments appear to have concerned one country in particular - the United States - and have involved the resources and national interest of a number of third States whose nationals have been convicted of capital crimes under the criminal laws of states of the United States and who have been put to death in spite of the fact that their trials and convictions proceeded without the form of consular advice and protection envisaged and provided by article 36 of the Vienna Convention. States that have been concerned in the protection of their nationals who have been convicted of murder and sentenced to die have included Mexico, Paraguay, Guatemala, Canada, and Germany.

The "consular notification" problem arises under article 36 of the Vienna Convention, which states inter alia that: "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: ... (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation .... " Importantly, article 36 continues, to say that "2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

Over the course of the past several years, significant cases have been decided in the United States concerning this provision of the Vienna Convention and the effect to be given to it in the course of criminal appeals from internal state criminal justice systems. Many constitutional difficulties are presented on the national plane when federal authorities attempt to reconcile their international obligations with their domestic constitutional architecture. This has been made all the more complicated by entirely predictable efforts, by the States whose nationals are to be put to death, to seek protective measures and redress from the International Court in the light of the pending execution of their nationals to whom protection under the Vienna Convention has been denied. Thus the machinery of the International Court has been placed in motion in relation to these matters. It has been frustrated at every turn.

Of the five high-profile U.S. cases in this line in the past two years, two—*Breard* (1998, a Paraguayan national)[3] and *LaGrand* (1999, a German citizen)[4]—have engendered literally last-minute appeals to the International Court from pending executions in states of the United States. The other three cases were: *Murphy* (1997, a Mexican),[5] *Villafuerte* (1998, Honduran),[6] and *Faulder* (1998, Canadian).[7] The International Court proceedings arose out of the *Breard* and *LaGrand* cases.[8] The International Court applications were filed only days before the death sentences were to be carried out; they were brought under the optional protocol to the Vienna Convention; each, quite logically, sought postponement or stay of execution of the convicted murderers in order to determine whether there should be retrials or other relief ordered based on the conceded non-compliance—by Virginia in Breard's case and by Arizona in LaGrand's—with the notification and consular assistance provisions of the Convention. In both cases the Court indicated a unanimous order *in ipsissimis verbis* to the effect that "The United States of America should take all measures at its disposal to ensure that [the condemned man] .... is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order ...."[9]

In addition to the proceedings before U.S. appeals courts, the United States Supreme Court and the International Court of Justice, it should be noted that Mexico has requested a general advisory opinion from the Inter-American Court of Human Rights in San José, Costa Rica.[10]

The general pattern of all of these cases is, stated simply, as follows: a foreign national is arrested for a capital offense and is tried in the courts of one of the states of the United States. The state authorities either do not know that he was a foreign national, or that as such he is subject to protective consultation with his consulate under article 36 of the Vienna Convention—or choose not to notify him of that right or to provide assistance. In each case there is a conviction, and a consequent sentence of death. Following this, lawyers for the condemned man discover the availability of the "Vienna Convention defense," and seek to assert it, in the state courts of the convicting state, or in the U.S. federal courts and in particular the U.S. Supreme Court, on a writ of *habeas corpus* or other relief intended to set aside the conviction and obtain a fresh trial at which, it is asserted, the defendant could have been made fully aware of his rights to consultation and in which, it is argued, he would have been more fully able to comprehend the charges against him and to formulate an effective defense. At the same time, in two of the cases applications were filed in The Hague with the International Court of Justice by the condemned men's countries, seeking adjudication of the issues presented by the Vienna Convention and the indication of provisional protective measures pending a decision.

The *Breard* case is the one where these issues have been most fully explored;[11] this case and its tributary matters[12] have already been subject to substantial and detailed exposition in the *The American Journal of International Law*,[13] where a concentrated selection of current commentary was promptly published in a single "Agora,"[14] in which however most efforts appear to have been concentrated on internal U.S. constitutional issues rather than on the larger, and more international, elements of the problem. In the more complete dossier attached to the *Breard* file there was also a letter from Secretary of State Albright addressed to the Governor of the state of Virginia, requesting him to "exercise his powers as Governor and stay the execution"; this letter however characterized the language of the Court's Order as being "non-binding."[15]

Since the effectiveness of the Vienna Convention on Consular Relations in 1967, the United States enacted a law entitled the "Antiterrorism and Effective Death Penalty Act of 1996[16] ("AEDPA") which requires, for federal appeals from state court convictions, "a substantial showing of the denial of a constitutional right."[17] In addition, the so-called "procedural default rule" governs federal appeals from state convictions and requires that failure to raise a claim on appeal within the state system will prevent it from being raised subsequently in the federal courts when such a claim could have been known to the defendant or his counsel during the pendency of the state proceedings.[18] In the last-moment *Breard* decision on habeas corpus, the United States Supreme Court wrote that "It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts."[19] The Supreme Court added that " .... both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the 'supreme law of the land' [under the United States Constitution] and thus trumps the procedural default doctrine."[20] The Court rejected this argument as incorrect for two reasons.

The Court's first reason was (i) that the procedural rules of the United States would govern the matter, and that is an end of the matter. This dubious proposition was based on the Supreme Court's own interpretations of international law, and not those of an international tribunal—and resulted in a casual interpretation of the Vienna Convention that would appear to ignore the proviso in its article 36, paragraph 2, or to deprive it of meaning.[21] It is a mystery how the Court could have reconciled the requirement that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended" with what happened in the *Breard* case—or any of the other four cases related to it.

The second reason given by the Court was the "last in time rule" accepted in the United States. Its application in this situation was also illogical. The Court ruled (ii) that AEDPA—being later in time than the Vienna Convention's effectiveness for the United States by almost thirty years—rendered the consular notification provisions of the Convention null *pro tanto* under the U.S. doctrine that treaties may be superseded by subsequent statutes. Although this proposition is correct as a matter of internal United States constitutional law, it is considered by some[22] to be a misconstruction of the difference between non-self-executing and self-executing treaties—and, perhaps even more significantly, to beg the question as to what the meaning of "time" might be. If the "last in time" doctrine were correctly applied to the situation under review, the following would be the result: the Vienna Convention, embodying article 36 consular protection and consultation, came into effect for the United States in 1969; AEDPA in 1996." Breard's trial took place in 1993, and his appeal on habeas corpus grounds in 1996. His claim under the Convention may not have been asserted until 1996, but the denial of consultation and the injury to Breard (if there was one) had already occurred before AEDPA came into effect.

Yet as the Supreme Court pointed out, this was "before Breard filed his habeas [corpus] petition raising claims under the Vienna Convention .... [and] Breard's ability to obtain relief based on violations of the Vienna Convention is *subject to this subsequently-enacted rule*, just as any claim arising under the United States Constitution would be."[23] However, just what was this "subsequently-enacted rule"? It was not a rule that affected the Vienna Convention; it was only a rule affecting criminal appeals. As long as the rule did not purport to countermand or extinguish rights under the Vienna Convention, those rights continued in all vigor. What the rule did purport to do was to prevent Breard from asserting those rights in a criminal appeal—and it obviously succeeded at that, even if at the price of international responsibility—but it did not extinguish those rights as such. Thus the provisions of article 36 of the Vienna Convention remained untouched by AEDPA, and equally well by any rule of procedural convenience or economy such as the U.S. "procedural default" rule. It is not at all the same result as, for example, a specific congressional mandate to impose sugar tariffs where such tariffs had been otherwise fixed by a prior treaty,[24] or a congressional determination no longer to recognize Taiwan as "China" in spite of preexisting treaties. It is also well-settled in American law that inconsistency of a subsequent statute with a prior treaty is not to be presumed, and that if any meaning can be given which would not invalidate the treaty it is to be preferred.[25]

Since what the AEDPA did was to limit the substance of criminal appeals from state courts—not to limit the application of a treaty—the treaty was thus not overruled by the AEDPA. The treaty as such did not concern filing appeals or remedies for want of consular notification, and the language quoted by the Supreme Court from *Reid* v. *Covert* ("the statute *to the extent of conflict* renders the treaty null") does not work in this case; there was no "conflict" whose extent could be measured since the AEDPA did not pretend to *conflict* with the Vienna Convention, or *a fortiori* to render it null. Since neither the AEDPA nor the procedural default doctrine purported to affect rights under the Vienna Convention, the obligations of the United States under article 36 (1) (c) remained alive. The violation of that provision was a continuing violation, and should be recognized as being in existence *de novo* at all times up to the time when the appeal on habeas corpus grounds was made. The treaty obligations, remaining unaffected, would then—in turn—have "trumped" the AEDPA and the procedural default rule.

Moreover, from the point of view of contributory fault it was Virginia and the United States, not Breard, that created and maintained the legal quandary in which he found himself. It would not have been necessary for Breard to lodge his appeal in 1996 if, in 1993, the State of Virginia had performed its duty or the U.S. Government made sure that Virginia did so. Although the conviction and sentence may have been handed down in 1993, their effects were persisting and remained continuously in existence right up to Breard's final moments. Breard's rights guaranteed by the Convention were resurrected a *scintilla juris* after that trumping occurred, as long as it can be demonstrated that the AEDPA did not invalidate or revoke the convention—which can hardly be claimed. The question whether there could be a valid subsequent appeal incorporating assertion of rights from the earlier treaty that were not so contravened by the subsequent statute is therefore a complex one, and the answer would depend on the extent to which *that* right can be considered as being continuously in existence.

The U.S. Supreme Court was also of the view that article 36(2) of the Vienna Convention, indicating that rights thereunder "shall be exercised in conformity with the laws and regulations of the receiving State," can be read as saying that it is permissible under international law for the laws and regulations of the receiving State to make it impossible effectively to exercise those rights. It is incomprehensible how the Court could have reached that conclusion: in the very same paragraph, it set out the Convention language that should be dispositive of the very issue in the case—the article 36 (2) proviso that "said laws and regulations must enable *full effect to be given to the purposes for which the rights accorded under this article are intended.*" (Emphasis added.) The purposes of consular access rights are quite obviously to protect the criminal defendant nationals. To cut off the right of appeal on the basis of failure to raise the question of lack of consular access under the Convention in state court, when notification of such consular access was the duty of the arresting (receiving) State and was not in fact performed, is as absurd as Catch-22 but not in the least amusing. It is in fact the precise *opposite* of the performance of the duty to "enable full effect to be given to the purposes for which the rights accorded under this article are intended." In consequence, the language on which the Supreme

Court relied in the Convention was inapplicable to the *Breard* case, and the case was wrongly decided.

The Supreme Court seems also to have been of the view that it makes no difference if the negligence of the receiving State resulted in the fact that that the criminal defendant was not notified of his rights under the Convention. Over the past few years, severe restrictions have been placed on the right of convicted criminal defendants in the United States to pursue multiple appeals. However even if a criminal defendant, represented (as Breard was) by counsel, can correctly be said to have "waived" his right of consular notification, this has no effect on the non-compliance of the receiving State under the Convention and its responsibility under international law.

* *

These death penalty cases therefore present, in an unalloyed pure form, the conflict between the domestic legal order and the international system. The issues are clouded by the federal/state complexities which must of course complicate the matter, without which the matter would in every likelihood not have become such a pressing international issue today; it is essential to separate that which is not at issue from that which is.[26]

What is not at stake is the actual correctness of the determinations made by the U.S. courts—and in particular the Supreme Court. What is at issue is the reaction of the other organs of the State concerned—the executive power of the United States—to those inadequate decisions. Moreover, what is not at issue is whether the Supreme Court correctly interpreted U.S. domestic federal appeals practice; it may well have done, but that practice must also be measured against the less subjective lens of international scrutiny, and for reasons of internal illogic alone should be found wanting. Nor is there a question—although it is tempting to think that there is—about the correctness of the U.S. Supreme Court's evaluation of the effect of international legal obligations on U.S. domestic practice or the extent to which the U.S. Supreme Court is obliged to give effect to views or orders of the International Court. That subject can be more appropriately dealt with in much larger compass and in a different context; for the purposes of the present review it suffices to consider how correctly the Supreme Court actually decided matters with a view to determining again what *other* State action by, e.g., the White House, might have followed.

Also not at issue is the question whether a state governor was correct to ignore the

International Court, or whether he should have heeded a precatory letter addressed to him by the Secretary of State. Far more interesting is the issue whether the federal executive could or should have acted more forcefully[27] in light of, e.g., Virginia Governor Gilmore's determination not to postpone the execution of Breard.[28] Why did President Clinton not see fit to telephone the Governor of Virginia, to explain directly that a delay in execution would make possible an orderly resolution of the matter before the International Court of Justice?[29]

Likewise, *il ne s'agit pas* of the correctness of the U.S. Supreme Court's premise—or the conclusion of the Governor of Virginia, or the legal position of the U.S. Department of Justice or Department of State in their joint amicus curiae brief filed in the Breard v. Greene proceeding in the Supreme Court—that the provisional measures order of the International Court was not "binding."[30] This is a serious matter of more than academic interest, but the real issue from the point of view of the international lawyer remains whether *the position of the United States* as a party to the Vienna Convention and the Statute of the Court should have been otherwise. Internal disagreements are interesting but not decisive; what is decisive is that no one in the U.S. federal government or state governments appears to have found anything much wrong with this picture.

Finally, the acceptability of capital punishment is not at issue. The fact that it is only in use in a few modern States, and that the United States, China, and South Africa lead the rest of the world in this practice, is not relevant. It is not relevant that the great majority of States perceive the death sentence as being a basic violation of international human rights. It is only because of the persistence of capital punishment in America—a peculiar anachronism—that the United States has found itself in the difficult position of a non-complying ICJ respondent; the death row situation is the quintessential instance where an order indicating provisional measures from the ICJ could have been applied, but was not.

The key issues which emerge from consideration of these matters on the international plane are then the following. First is the obvious question whether a State can be a party without reservations to an international convention, and fulfil its obligations, if in fact its constituent or component federal entities can pick and choose what obligations to respect?[31] Related is the issue whether such a form of frustrated compliance can be converted into a valid position in international law that the State in question is thus prevented from complying, particularly in view of the unambiguous rule expressed in article 27 of the Vienna Convention on the Law of Treaties[32] and the fact that the United States did not append a "federal reservation" to its accession to the Vienna Convention on Consular Relations. Perhaps the present matter in essence raises the question of an "invisible reservation" for subsequent State action—or action by provincial or internal state authority—that is sought to relieve the State from an uncomfortable sensation that it might be in default on its international obligations.

A related issue is evidently whether "great powers" are in fact and indeed above the law. Would Paraguay have dared to take the same position that the United States Government took, had the shoe been on the other foot? One cannot help but raise the question—sorely tested in the years since the *Nicaragua* case—of the United States' commitment to international law in general and the International Court in particular.[33] To some extent—and this is matter of no small concern—the present problems can be viewed as stemming from a U.S. constitutional framework and history that, although excellent in many ways, is seriously out of harmony with the modern world in others. The role and international character of bilateral treaties in the 18th and 19th Centuries can hardly be compared to the role and character of multilateral conventions in the 20th Century, with almost two hundred signatories, and in particular conventions establishing international institutions with lives of their own.

It is not usual in the United States to suggest, even obliquely, that our Constitution may have one or two shortcomings. It reminds of the situation of the fable of the emperor's new clothes.[34] The United States possesses one of the only longest-lived democratic constitutions in the world—one that has lasted, with a relatively modest number of amendments, for over two centuries.[35] Although this is not the forum for discussion whether the constitution needs revision and clarification beyond piecemeal clarification and interpretation by the U.S. Supreme Court under *Marbury v. Madison*,[36] the present author believes that it sorely does—particularly in this cantankerous area of the relationship of the United States Government and its component state governments to the international treaty obligations of the United States.[37]

Part of the overarching problem presented here is also that, in the United States, "international law" is widely and frequently perceived as being "international law as applied by the United States"; it is as if it had no independent existence. This is a cultural bias reflected inter alia in simple conventions such as the nomenclature of the American Law Institute's "Restatement (Third) of the *Foreign Relations Law* of the United States."[38] It even appears in the excellent Agora in *The American Journal of International Law*,[39] where most of the points made by most of the authors related, most of the time, to internal U.S. administrative and constitutional practices, or to the views of the United States on such issues as, for example, whether provisional measures orders of the International Court are "binding"—not on what the international law on those questions might be.

It is therefore no surprise that the United States Supreme Court tripped over this very fence in the course of its *Breard v. Greene* opinion. The Supreme Court there said that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such"[40]; what it should have said was that it "should give great respect and weight to the interpretation of an international treaty rendered by the International Court of Justice." The language used could be mistaken for condescension; yet it is the International Court that is surely the senior institution. It also creates an inference that the United States stands outside that "international court" or that it is somehow not party to the Statute. Whatever the Supreme Court's meaning may be, the International Court of Justice is hardly just "an international court with jurisdiction to interpret such": it is the principal judicial organ of the most significant international organization that the world has yet known, and of which the United States—although significant, is but one of many member States.

In oral argument in the *Fisheries Jurisdiction* case in June 1998, in the International Court, this writer stated that:

> "There is an interesting parallel ... to the dualistic conflict recently and so tragically illustrated by the Breard case (*Paraguay v. United States*) and the interaction between the Court's Order for provisional measures and the decision of the United States Supreme Court rejecting Mr. Breard's last appeal. In that case, the view expressed by the United States Supreme Court appears to be that the international rights and obligations of the United States *are appropriately to be measured by United States law.*"[41]

In the Supreme Court decision, the key is to be found in the language quoted over note 40 *supra*. In that passage, the Supreme Court immediately followed the statement that "it has been recognized *in international law*" with citations—not to any international law authorities (such as the International Court)—but to three domestic U.S. cases decided by itself. Perhaps the Supreme Court intended to write "it has been recognized *that* in international law..." The existing language cannot however support the proposition that their conclusions "have been recognized *in* international law" any more than French or German municipal court decisions on matters arising under European unification can be characterized as "international" authority; they are not international authority, even if they speak of international matters

This fallacy in the Supreme Court opinion is reflected in its characterization of what are acceptable "international law" sources. The Supreme Court seems to have been oblivious of the fact that there were other "actors" or "obligations" at work. These included the duties owed by the United States (and Virginia) to the other signatories of the Vienna Convention, or the State of nationality of Breard himself. They also included the requirement to give "full effect ... to the purposes for which the rights accorded under this article are intended." Only under a purely U.S. interpretation of internal United States appellate and constitutional practice could one conclude that no U.S. law or regulation was being broken by failure to grant appeal to Breard and that, therefore, there was no non-compliance with the provisions of the Convention. The law applied by the Supreme Court to the validity of blocking criminal appeals does not answer the question whether or not the obligations of the United States under the Convention have been met. The Court has confused two quite different sets of rights and obligations, and resolved the issue by citing itself—instead of by looking outside the U.S. system.

Just as the Supreme Court should have correctly addressed the relationship of international treaty obligations to U.S. internal practice, so should the International Court bite the bullet on saying whether or not it considers that its orders for provisional measures of protection *pendente lite* are—if not technically "binding" under article 59 of the Statute—at least entitled to great respect under the Statute and the Charter. Why could this not be done in the next case involving an application for provisional relief? Sufficient reason must surely be that the Court has now recently endured two slaps in the face from the United States and its state authorities, and that this cannot merely be ignored. It is high time that the Court took a stronger position to protect the integrity of its own case-law without doing violence to its own precedents and to international law itself.[42]

At the heart of the international law problem, however, is the relationship between the United States itself and the International Court, "the principal judicial organ" of the organization of which it is obviously a highly significant part. Is it right or wrong for the U.S. Government to consider that an order for provisional measures by the Court, in a case where imminent death of the protected individual is concerned, is not "binding" and need not be complied with? In *Breard* the Department of Justice and the State Department took such a position.[43]

How could there be any *doubt* whether an order of provisional measures is at least tantamount to being "binding"? Although scholars have carefully attempted to crack the nut of the nature and effect of provisional measures, the legal arguments generally made appear somehow to be wide of the mark.[44] The real point is whether, in the large, the writ of the International Court counts for something or does not. Whether the order for provisional measures is technically, legally binding or not is not in fact the question. The real question is: what is the responsibility of States for making sure that the decisions of the Court are meaningful?

The most current reflections on this are contained in Professors Henkin's and Paust's pieces in the *American Journal*, with which this writer emphatically agrees.[45] However these analyses proceed more to deal with the *U.S.* view of what constitutes an international treaty obligation—and the justification *vel non* for that view—and less with what makes up that obligation to begin with. (An excellent review of the issues and authorities to 1987 is also provided in the *Restatement*.[46]) A few remarks on the international provenance and content of that obligation are therefore appropriate.[47]

The Statute of the Court is an integral part of the Charter of the United Nations[48] and as such is therefore *primus inter pares* in the contemporary universe of multilateral treaties. It goes without saying that any provision of the Statute, including its articles 41 (provisional measures) and 59 (binding force) should, together with those of article 92, paragraph 1 of the Charter,[49] be interpreted in accordance with the settled canon of treaty interpretation expressed in article 31 of the Vienna Convention on the Law of Treaties, to the effect that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Essentially, the reasoning advanced *against* provisional measures being "binding" rests on the proposition that an order indicating them under article 41 is not a "*decision* of the International Court of Justice" within the meaning of article 94 of the Charter or article 59 of the Statute,[50] and that States party to proceedings in the Court can essentially pick and choose as to whether they will render lip-service to an order of provisional measures or, as in many instances, virtually ignore them. Of course an order is not a decision or a final judgment. However what one is analyzing here is less the legal taxonomy of such an order, and more the effectiveness and deference that should be accorded to such an order by a party in a case.

However, when one turns to consider the object and purpose of article 41 of the Statute,[51] it is impossible to understand how "the respective rights of either party" could be "preserved" *unless* the parties give to a provisional measures order a deference that is the functional equivalent of compliance based on "binding" quality. Although it is elementary to recognize that an order for provisional measures is not and cannot be a decision or a judgment, on the other hand it is not credible to say that a provisional measure (referred to in the Statute as a measure "*pending* the final decision" in the case, and one which "*ought to be taken* to preserve the respective rights of either party") could in good faith be viewed in the context of contributing to that decision, or preserving those rights, unless it were respected *pro tanto* as if it were a preliminary part of a decision or judgment of the Court, even if not itself such a decision or judgment. The fact that article 94, paragraph 1 of the Charter is worded in terms of an undertaking "to comply with the decision" would seem to require compliance with all component parts of a decision, and would include any significant constituent element of the decision—in particular an element as significant as an essential protective order. How else could States possibly apply the Statute of the Court and its article 41 "in good faith in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose"?

Moreover, it serves to recall that the third fundamental "Principle" of the United Nations, enunciated in article 2, paragraph 3 of the Charter, is that "All Members *shall* settle their international disputes by peaceful means in such a manner that international peace and security, *and justice*, are not endangered."[52] There is therefore an affirmative obligation on members to settle disputes in a manner where justice is not contravened; once a matter has been brought to the Court, the Court must function in accordance with its Statute to assist in that settlement; an integral part of the Statute is the inherent ability of the Court—or of any court—to issue interim orders specifying actions which "ought to be taken to preserve the respective rights of either party" in the course of reaching that settlement; and it cannot thus be argued that to deliberately ignore such a provisional measure of interim protection—or to treat them as optional or transitory—would be consistent with the object and purpose of the Charter (articles 2, paragraph 3 and 92, paragraph 1) or its integral part, the Statute of the Court (articles 41 and 59). It would distort the "ordinary meaning to be given to [their] terms ... in their context and in the light of [their] object and purpose." Sadly enough, it could also verge on being perceived as bad faith – particularly in instances where a State (such as the United States) has relied on obtaining precisely such measures in cases where it has been the applicant and another State the respondent.[53]

A related series of questions is of interest. Would these cases have emerged differently, either on the international plane or within the United States constitutional context, if any of the following had been true: (i) if the capital offense at issue had been a federal rather than a state offense, and if the prosecution and conviction had been under U.S. federal law – such as a federal espionage charge, or an accusation of treason or murder on a military post, or a pure federal capital crime – rather than under state law? (ii) If the conviction and sentence at issue had not been a death sentence, but were rather one where the convicted criminal had been condemned to serve a term of life imprisonment? (iii) If no recourse to the International Court of Justice had been sought?

As to (i), it must be obvious that placing the issue entirely on the federal level would have eliminated any residual arguments about internal constitutional proprieties. The same result would have been reached if, *ex hypothesi*, the State concerned (the United States) were not a federal State with internal state criminal justice systems but rather a unitary one. Then the United States would have had to respond directly to the issue of compatibility of execution of the death sentence by the United States, in the absence of consular protection of the defendant, with the unequivocally direct obligations of the United States rather than of one of its constituent federal states. Either a federal crime and conviction or a unitary framework would therefore have bought the U.S. treaty obligations into a direct and unarguable conflict with its conduct or lack of activity.

Likewise as to (ii), if these whole matters had not been circumscribed by the dramatic and logically "terminal" context of the death of the convicted criminal, these cases would surely have been resolved differently. If the human being subject to the whole proceeding is not in fact to be put to death, then he or she may live to see another day—whether or not in solitary confinement—and the international and internal juridical processes could have reasonably expected to reach a form of equilibrium. It would not have much mattered if the issue of a life-term prisoner were resolved in 1999 or in 2001—at least certainly not in the same sense as it matters in relation to the death of a convicted prisoner on a date certain.

The fact that the United States is among only a few States in the modern world that maintains capital punishment in the face of an overwhelming international human rights raises the stakes dramatically in relation to any provisional measures that the Court, for example, might indicate. The convicted criminal is either put to death at 3:00 P.M., or he is not, and the International Court will either have been ignored–or it will not. If the condemned man's sentence is executed, the matter is terminated and becomes, in the Anglo-Saxon parlance,[54] "moot." The international incorrectness of the situation, however, is not mooted.[55]

Finally, it is obvious that (iii) the proceedings brought before the International Court only cast the underlying problem into a different, and more serious, light and context. Instead of merely proceeding in the teeth of a contrary treaty—or of world opinion—the United States added repudiation of the Court for good measure.

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Conclusions almost suggest themselves. The international community has, in the next century, some education to perform—and in particular of those States who have become greater than ever and seem in some contexts to have lost their international legal compass. The International Court should—whenever it has an appropriate opportunity—clarify matters so that the *Breard* canard cannot be reproduced in the future; it is not fitting for the Court to be conservative or timid when there is no need for it to be so, and in fact a pressing need the other way. The United States, in its policy-making, should take heed of the proposition that unless there is a positive and solid political advantage to be gained or maintained, principles of international law and comity should be accorded great respect.[56]

Sir Winston Churchill once described the former Soviet Union as being "a riddle wrapped in a mystery inside an enigma."[57] The problem raised by these cases is more like a quandary wrapped in a dilemma inside a paradox. The quandary is the difficulty seemingly faced by the U.S. federal authorities in that they do not understand the consequences, and implications, of imposing standards and rules of U.S. domestic law to defeat treaty obligations. The dilemma is that it is naturally difficult for them to get out of the problem without reversing a string of cases that has already resulted in five deaths. The paradox is that even though recourse is had on an international plane to the mechanisms of the international legal system, and provisional measures of protection obtained and indicated by the World Court, one of the greatest constitutional tribunals in the modern world should seem to be quite indifferent to its sister institution and to the role and responsibility of the United States beyond its borders.

Perhaps one could even go further and state that the paradox is in turn to be found in a fatal incongruity of modern legal life: that the municipal and domestic systems proceed on their track, and the international system proceeds on another track, and that it is only for the weaker States and those who are dependent on integration of international law with domestic practice that the tracks are paralleled or caused to meet. For the superpowers of the world it is always easy, as the United States has done in these cases, to hide behind an unconcerned ignorance of what international law is.

Moreover, what is never considered in these kinds of cases is when a shield can become a sword (or vice versa). In the *Hostages in Iran* case,[58] the validity and effectiveness of provisional measures of protection were as important to the United States Government as they were annoying to it, only five years later, in the *Nicaragua* case.[59] What then are the interests to be balanced? Should the interest of the United States in protecting its nationals abroad be outweighed by its interest—or more properly the interest of the several states—in preserving the purity of the "procedural default rule" in the U.S. federal court system or even the "last in time rule" in the United States' constitutional practice?

Shortly after Breard was executed by Virginia, this author was told on impeccable authority that U.S. consular authorities around the world—but in Latin America in particular—were deeply concerned about the effect of the denial of consular protection and any remedy for that denial on U.S. citizens held in the prisons of foreign countries. Although one may be thankful that in all but a handful of those instances the death penalty issue cannot arise, there is nonetheless a serious issue presented as to the protection of U.S. nationals. Ironically the protection is not from State action or inaction failing to advise them of their consular consultation rights, but rather from the anger of other prison inmates who resent the fact that the U.S. criminals have received the benefit of consular assistance whereas they have not—and while some of their co-citizens have been put to death in the United States in spite of the lack of consular assistance in their defense. The American prisoners are being segregated from the general prison population, and so the concerns expressed in Secretary Albright's letter to Governor Gilmore appear[60] to have been borne out at least in part.

How would the United States feel if an American citizen were arrested and tried for a capital crime in a State, such as China or South Africa, where the death sentence is still applied, and if he or she had not been granted consular assistance under article 36 of the Convention? How would the United States Congress react to the situation if the absence of consular assistance had been due to the ineptitude or ignorance of the officials and local police of China or South Africa? What would the U.S. Department of State have to say if, in spite of these elements, Chinese or South African courts were then to reject an appeal for a new trial on the ground that internal Chinese or South African law provides only one bite at the apple and—although the accused may not have been aware of the issue at the time of trial—local counsel should have thought of it?

What more would the U.S. Administration say if it had filed an application with the International Court, and obtained indication of provisional measures requesting postponement of the execution until the issue of consular protection had been fully and properly determined, but then China or South Africa had simply disregarded the Court's order on the ground that it was not technically "legally binding" on China or South Africa? Finally, what would the reaction of the American press and public be if, after numerous entreaties from the United States, the accused were led to the firing-squad or the gallows without any serious attempt by Chinese or South African authorities to postpone the execution?

The answers to these questions are clear. What they prove beyond any doubt is that the United States appears now seriously to be embarked on a course where its own rules and standards can set aside cogent international values. Nothing can be more of a slap in the face to the writ of the International Court of Justice than to proceed to put a criminal to death in spite of an order of the Court that the execution should be postponed pending legal proceedings. In so doing the United States appears to be engaged in a form of selective amnesia, as it has forgotten the attitudes that would have governed it only two generations ago. Indeed, Secretary Albright in her letter to the Governor of Virginia got it right when she said that "the execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention.... [and] ... could be seen as *a denial by the United States of the significance of international law and the Court's processes in its international relations* ...."[61]

To his great credit, Professor Henkin in his *Agora* article enunciated simply and directly that many ideas "need reminding"[62] to United States federal and state authorities. Forty years ago, President Dwight Eisenhower was quoted as saying that "It is better to lose a point now and then in an international tribunal and gain a world in which everyone lives at peace under the rule of law."[63] It is time for the authorities in the United States—all the way from the justices of the Supreme Court and the advisers of the Department of State to police officers and consular officials—to reexamine the type of commitment that the United States once had to the international process, and the kind of respect for that process that Eisenhower's apothegm conveys. One would hope that such a respect does not require a clear and present danger or an opponent such as the Soviet Union in 1959.

If the international system is to mean something today, and is to contain promise for our future, one would hope that judicial and administrative unilateralism of the type so clearly manifested by these cases can be repressed; with adequate light and reasoning shone on it, perhaps it will go happily into remission. Otherwise it is hard if not impossible to reach any conclusion other than that the U.S. authorities have assumed the role of a supersystem as well as of a superpower, and that this—even in instances where men are being put to death—is all that matters.

Keith Highet

NOTES

(N.B. I would prefer *footnotes* to end-notes, but am complying with the publishing instructions about manuscript submissions' avoiding footnotes in the text. — ***K.H.***)

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[1] *Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), *I.C.J. Reports 1989*, p. 15. The author was privileged to plead as counsel and advocate in this matter before President Ruda and the Chamber.

[2] 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. Done at Vienna on April 24, 1963; entered into force on March 19, 1967.

[3] Breard v. Virginia, 445 S.E.2d 670 (1994); Breard v. Virginia, 513 U.S. 971 (1994); Breard v. Netherland, 949 F.Supp. 1255 (E.D. Va. 1996), *aff'd*, 134 F.3d 615 (4th Cir. 1998); Breard v. Pruett, 134 F.3d 615 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352, 140 L. Ed. 2d 529 (1998). A clear and careful exposition of these cases is given by Jonathan I. Charney and W. Michael Reisman, Editors in Chief of *The American Journal of International Law*, in "The Facts," contained in "Agora: *Breard*," 92 *American Journal of International Law*, No. 4 (October 1998), pp. 666-675, at pp. 666-712. And see also *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998 (I.C.J. Communiqué 98/17).*

[4] Owing to the fact that Mr. LaGrand was executed only days before this writing, the sole written reports to hand are in the I.C.J. Communiqués and in the *International Herald Tribune* of 4 March 1999, at p. 12 ("Governor Rejects International Please for Doomed Killer") and 5 March, 1999, at pp. 1 and 3 ("Execution Angers Germany").

[5] Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997). See William C. Aceves, case note comment in "International Decisions," 92 *American Journal of International Law*, No. 1 (January 1998), p. 87.

[6] Villafuerte v. Stewart, 142 F.3d 1124 (9th Cir. 1998), at 1125. Mr. Villafuerte's last appeals were rejected by the U.S. Supreme Court on 21 April 1998 following a negative determination on commutation by the Arizona State Board of Executive Clemency. The Honduran Minister of Foreign Relations unsuccessfully sent a note to the Governor of Arizona requesting a stay in the execution for further investigation ("Cancillería Solicita Conmutación de Pena Para Compatriota en EUA," *La Prensa*, Tegucigalpa, 16 April 1998). The Honduran Government determined that there was insufficient time before Villafuerte's execution to bring a case against the United States before the International Court of Justice and declined to do so after the execution. (Interview with diplomatic sources.) (The author would like to acknowledge with gratitude the able assistance of Lic. Lorena Perez Villanueva in obtaining this and other background materials.)

[7] Faulder v. Texas, 611 S.W.2d 630; 1979 Tex. Crim. App. Lexis 1410 (April 18, 1979); Joseph Stanley Faulder v. Wayne Scott, Director (Faulder v. Scott), 81 F.3d 515 (5th Cir. 1996), at 517; Faulder v. Johnson, 81 F.3d 515 (5th Cir.), *cert.* denied, 117 S.Ct. 487 (1996), and Petition for Writ of Certiorari, Joseph Stanley Faulder v. Gary L. Johnson, U.S. Supreme Court, Case No. 98-7001, October Term, 1998, filed 24 November 1998, *cert.* denied, January 25, 1999. See also *Case*

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concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Provisional Measures, Order of 3 March 1999 (I.C.J. Communiqué 99/9).

[8] They were brought by Paraguay in the *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998 (I.C.J. Communiqué 98/17)* and by Germany in *Case concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Provisional Measures, Order of 3 March 1999 (I.C.J. Communiqué 99/9).*

[9] Order of 9 April 1998 in *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, p. 9; and Order of 3 March 1999 in *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America)*, p. 5.

[10] December 9, 1997 Request for Advisory Opinion OC-16, Submitted by the Government of the United Mexican States; Written Observations of the United States of America, June 1, 1998; and Observations of the Inter-American Commission on Human Rights on the Request for Advisory Opinion OC-16 Before the Inter-American Court of Human Rights, April 30, 1998. (No opinion has yet been issued by the Court.)

[11] In the Murphy case (note 5 *supra*), the court stated that "'Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national.'" 116 F.3d 97, 100. See also Aceves comment, *id.*, p. 88: "While Virginia officials had failed to notify Murphy of his rights under the Vienna Convention, this omission did not preclude his raising the claim on his own. 'The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a resonably diligent investigation by his attorney, and the factual predicate for that claim – that Murphy is a citizen of Mexico – was obviously within Murphy's knowledge.'"

[12] The interrelationship between the cases is obvious. In Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D.Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352 (1998), Paraguay itself had commenced an action in the U.S. federal district court seeking relief for Breard and the violations of the Vienna Convention, but the court rejected subject matter jurisdiction "because the claimants were not alleging a 'continuing violation of federal law' and therefore could not being their claims within the exception to the immunity of states under the [U.S. Constitution's] Eleventh Amendment permitting prospective remedies." (Charney and Reisman, *op. cit. supra* note 3, p. 668.) Why is the violation of federal law (i.e. the Vienna Convention) not a "continuing violation," inasmuch as Breard had not been, and was still not being, accorded the consular consultation protections of article 36 of the Convention? See also Breard's response to accusation of his "procedural default" in not earlier raising the Vienna Convention defense, "that he had no reasonable basis for raising his Vienna Convention claim until April 1996 when the Fifth Circuit decided *Faulder* v. *Johnson* ..." (*ibid.*).

[13] "Agora: *Breard*," 92 *American Journal of International Law*, No. 4 (October 1998), pp. 666-712.

[14] To its substantial credit and that of the editors, this "Agora" includes, as well as the introductory factual exposition by Charney and Reisman, (*op. cit. supra* note 3, pp. 666-675), the following studies: Curtis A. Bradley and Jack L. Goldsmith, "The Abiding Relevance of Federalism to U.S. Foreign Relations," *id.* at pp. 675-679; Louis Henkin, "Provisional Measures, U.S. Treaty Obligations, and the States," *id.* at pp. 679-683; Carlos Manuel Vázquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures," *id.* at pp. 683-691; Jordan J. Paust, "*Breard* and Treaty-Based Rights under the Consular Convention," *id.* at pp. 691-697; Lori Fisler Damrosch, "The Justiciability of Paraguay's Claim of Treaty Violation," *id.* at pp. 697-704; Frederic L. Kirgis, "*Zschernig v. Miller* and the *Breard* Matter," *id.* at pp. 704-708; and Anne-Marie

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Slaughter, "Court to Court," *id.* at pp. 708-712. See also Peter Bekker and Keith Highet, "International Court of Justice Orders United States to Stay Execution of Paraguayan National in Virginia," *ASIL Insight*, April 1998, and James A. Deeken, "A New *Miranda* for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of *Printz v. United States*," 31 *Vanderbilt Journal of Transnational Law No. 4, October 1998, pp. 997-1039.*

[15] Letter of April 13, 1998 from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia, reproduced in Charney and Reisman's Note, *op. cit. supra* note 3, at pp. 671-72

[16] Pub. L. No. 104-132, 110 Stat. 1214.

[17] See Aceves comment, *op. cit.* note 5 *supra*, p. 87.

[18] As stated by the Supreme Court of the United States in Breard v. Greene, *supra* note 3: "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Wainwright v. Sykes, 433 U.S. 72 (1977). Claims not so raised are considered defaulted. Ibid. By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review." 140 L. Ed. 2d 529, at 537.

[19] *Ibid.*

[20] *Ibid.*

[21] "First, while we should give respectful consideration in the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, *it has been recognized in international law that, absent a clear and* express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. See Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); Volkswagenswerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); Société National Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. Of Iowa, 482 U.S. 522, 539 (1987). This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.' Article 36(2), [1970] 21 U.S.T., at 101." (Emphasis added.)

[22] The Court stated that: "We have held 'that an Act of Congress ... is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, *the statute to the extent of conflict renders the treaty null.*' Reid v. Covert, 354 U.S. 1, 18, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (plurality opinion); see also Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888) (*holding that if a treaty and a federal statute conflict, 'the one last in date will control the other'*)." (Emphasis added.) See also the author's note on this subject, "The Irresistible Force and the Immovable Object: Reflections on the Recent PLO Controversies," in 29 *Virginia Journal of International Law* (Summer 1989), at p. 859.

[23] 140 L. Ed. 2d at 538; emphasis added.

[24] See e.g. Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888).

[25] See The Charming Betsy, 6 U.S. (2 Cranch) at p. 118 (1804). In the *Charming Betsy* the U.S. Supreme Court wrote that "It has also been observed that an act of Congress *ought never to be construed to violate the law of nations if any other possible construction remains*, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." (2 Cranch at p. 118; emphasis added.)

[26] Following the famous dictum of Marshal Foch at the beginning of each of his staff meetings during the Great War: "*Messieurs, de quoi s'agit-il?*"

[27] See for example Louis Henkin, "Provisional Measures, U.S. Treaty Obligations, and the States," *op. cit. supra* note 28, at pp. 679-683.

[28] Joined with the somewhat baffling statement that the people of the Commonwealth of Virginia had to be protected from the fear of crime, as if the issue were one of letting Breard out of prison entirely. See Commonwealth of Virginia, Office of the Governor, Press Office, Statement of April 14, 1998 by Governor Jim Gilmore Concerning the Execution of Angel Breard, reproduced by Charney and Reisman in their Note, *op. cit. supra* note 3, pp. 674-75.

[29] Professor Henkin, *op. cit. supra* at 681: "Since, in my view, the ICJ Order was legally binding, the President (the executive branch) was obligated to make stronger, 'mandatory' representations to the Governor of Virginia, stressing the legal obligation of the United States to stay the execution, and the constitutional duty of the Governor to act on that obligation. The Solicitor General should have called the attention of the U.S. Supreme Court to the legal obligation of the United States; the Supreme Court might have taken account of that obligation on its own motion. (If, to a majority of the Court, the posture of the proceedings before it did not provide an appropriate opportunity to order the stay of the execution, the Court might have invited the executive branch to invoke other judicial assistance by other proceedings.) And was there not available to the Attorney General, or to the Secretary of State, an independent proceeding in a federal court for an order to the Governor or other state officials to honor the U.S. treaty obligation and stay the execution?"

[30] See the relevant provisions of the *amicus* brief filed by the U.S. government, reproduced in the Agora in Charney and Reisman's Note, *op. cit. supra* note 3 at pp. 672-673. Of particular interest is the brief's comment that "the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding *by the respondent*. ... *The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order*." (*Op. cit.* at p. 672; emphasis added.) In fact, ironically enough, it was in the Court's Judgment of 24 May 1980 in the *Hostages* case (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3), a case of great importance to the United States, in which the Court specifically took note of, and criticized, the U.S. incursion by military units into Iranian territory on 24-25 April, saying that "The Court ... feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries." (*Id.* at p. 43, para. 93.) Thus the Court *has* clearly criticized non-compliance with an order for provisional measures—but such non-compliance was not that of the *respondent* (Iran), but rather the *applicant* (the United States). Although the Department of Justice and State Department amicus brief before the Supreme Court was technically accurate, it was also clearly misleading, if not disingenuous: one can only pause to wonder whether Roberts Owen, the then U.S. Legal Adviser and Agent, and (now President)

Stephen Schwebel, the then Deputy Agent and Counsel, would have hoped that the 1979 order for provisional measures were considered to be binding or the equivalent—and if it were not, why such an order had been sought from the Court in the first place?.

[31] See report of the meeting of the ASIL/CCIL Joint Panel on the Conduct of International Relations in Federal States, American Society of International Law *Proceedings of the 85th Annual Meeting, Washington, D.C., April 17-20, 1991*, pp. 132-151.

[32] "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This raises a subsidiary issue of the extent it can be validly said that a State with an uninhibited "federal reservation" can—at least as long as it avoids international responsibility for its municipal actions—be genuinely said to be a party to the convention at all in the sense that its obligations can be increased or decreased at will by a conjunction of federal and internal provincial or state action. This recalls the famous separate and dissenting opinion of Judge Sir Hersch Lauterpacht in the *Interhandel* case (*I.C.J. Reports 1959*, p. 6, at pp. 95, 97-119) in which he concluded that a State possessed of a self-judging reservation to its optional clause declaration such as the"Connally reservation," could be viewed as not having accepted the obligations of the Statute; but it may however be distinguished from that lamentable situation inasmuch as the self-judging reservation goes to the issue of exercise of jurisdiction *by the Court* and, just as importantly, the exercise of the Court's powers under article 36, paragraph 6 of the Statute. This is therefore a matter quite fully distinguishable from other treaty escape-hatches, such as a federal state clause or (even) a "last in time" rule.

[33] See, by the present author, "Winning and Losing: the Commitment of the United States to the International Court – What Was It, What Is It, and Where Has It Gone?" in 1 *Transnational Law & Contemporary Problems*, pp. 157-200 (1991).

[34] The story being that the emperor had been tricked by his tailor into wearing "invisible robes"—and that, at a public levée, there was no one except a little child who was brave enough to be politically incorrect in saying to him that he was sorely deficient in the apparel department.

[35] See the present author's comments in article cited *supra* in note 22.

[36] Marbury v. Madison, 1 Cranch 137 (1803).

[37] When eminent constitutional scholars had to be marched up to Capitol Hill, in the fall of 1998, to give testimony on what the terms "high crimes and misdemeanors" might have meant in the impeachment provisions of Article II, Section IV of the U.S. Constitution, why is it not possible to take the bull by the horns and clarify the matter by a few selective amendments? Is it not possible to decide once and for all whether the Second Amendment right to "keep and bear arms" should prevent gun control, or whether hate statements and serious verbal threats are speech that is protected under the First Amendment? The United States federal courts and Supreme Court must otherwise continue to do their best to refine the meaning of these provisions into clarity episodically, as litigated cases of interpretation arise in the court system; yet to some extent at least it should be recognized that the method of judicial review alone is unsystematic and inefficient today, and leaves unnecessary ambiguity and anachronicity—and thus uncertainty—in place. (See comment by the author, *op. cit. supra* note 25, at p. 876.)

[38] American Law Institute, 2 vols. (1987); emphasis added.

[39] Fortunately, not "The American Journal of *the Foreign Relations Law of the United States*"!

[40] Breard v. Greene (1998), 140 L. Ed. 2d. 529, at p. 537.

[41] *Fisheries Jurisdiction (Spain v. Canada), Preliminary Objections*, Oral Argument of 10 June 1998 (emphasis added and footnotes omitted).

[42] See note 30 *supra*; see also H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice," in Rudolf Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Springer, Berlin 1994), p. 1, at pp. 28-32; and see also Note by Karin Oellers-Frahm, "Interim Measures of Protection," in 2 *Encyclopedia of Public International Law* (Elsevier, North-Holland 1995), at pp. 1027-1034, especially at pp. 1029-1030.

[43] See discussion under note 30 *supra*.

[44] As Hugh Thirlway has pointed out: "it is essential to be sure what we mean by binding: binding in what way?" (Thirlway, *op. cit. supra* note 42, p. 29)—and "a provisional measures Order can only be binding as a matter of treaty-law [as opposed to general international law]; the thesis that measures are binding rests solely on the premise that the Statute to which the States parties have acceded gives the Court power to indicate binding measures. ... because of the wording of the Statute and the *travaux préparatoires* it is very difficult to accept that premise that measures were intended by [the] Statute to be binding." (*Ibid.*)

[45] See Henkin, *op. cit. supra* note 14, pp. 680-681; Paust, *op. cit. supra*, *id.* at 685-686 and note 18.

[46] 2 *Restatement (Third) of the Foreign Relations Law of the United States*, § 903, Reporter's Note 6, at pp. 369-70 (American Law Institute, 1987) (also cited in the *amicus curiae* brief of the United States in *Breard v. Greene*, 13 April 1998, p. 49.)

[47] Although the scope of this article does not provide sufficient space to discuss the numerous and conflicting examples in this area, the author has in process a study on this particular subject—one which is fully worthy of further reflection, and one which may indeed provide a *clef de voûte* for a disciplined, and correct, analysis of the *res judicata* of International Court decisions and of the application thereto of the rule *pacta sunt servanda*.

[48] Charter, article 92.

[49] "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

[50] Stating that "The decision of the Court has no binding force except between the parties and in respect of that particular case," and consequently implying (conclusively) that the decision of the Court *does have* binding force between those parties, and in respect of that case.

[51] "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which *ought to be taken to preserve the respective rights of either party*.

"2. Pending the *final decision*, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." (Emphasis added.)

[52] Emphasis added.

[53] See for example *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7, and *Judgment, I.C.J. Reports 1980*, p. 73; and

contrast *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169 and *Merits, Judgment, I.C.J. Reports 1986*, p. 14 (concerning the Nicaraguan complaint that the United States had refused to comply with the provisional measures indicated in 1984, see pp. 143-145, paras. 286-291, especially at p. 144, paras. 287-289).

[54] The word "moot" itself being anciently from the Anglo-Saxon "*mot*" and the Middle English "*mote*"; Skeat, W.W., *Etymological Dictionary of the English Language*, Oxford, rev. ed. 1958, pp. 384-385.

[55] Paraguay requested that the case be removed from the Court's list seven months after Breard's execution: *Order of 10 November 1998; ICJ Press Communiqué 98/36*, 11 November 1998.

[56] For a clear appeal to and for comity, see Anne-Marie Slaughter, "Court to Court," *op. cit. supra* note 14, at pp. 708-712.

[57] As quoted in "The Kurils Quandary," contribution to the *Liber Amicorum for Eduardo Jiménez De Aréchaga* (Fundación de Cultura Universitaria, Montevideo, Uruguay, 1994), pp. 601-37.

[58] *I.C.J. Reports 1980*, p. 3; see discussion *supra* note 30.

[59] Citations in note 54 *supra*.

[60] "I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. ... The immediate execution of Mr. Breard in the face of the [International] Court's April 9 [Order for Provisional Measures] ... could ... limit our ability to ensure that Americans are protected when living or traveling abroad." Cited in the introductory factual exposition to the Agora in the Note by Charney and Reisman, *op. cit.* note 3, pp. 666 and 672.

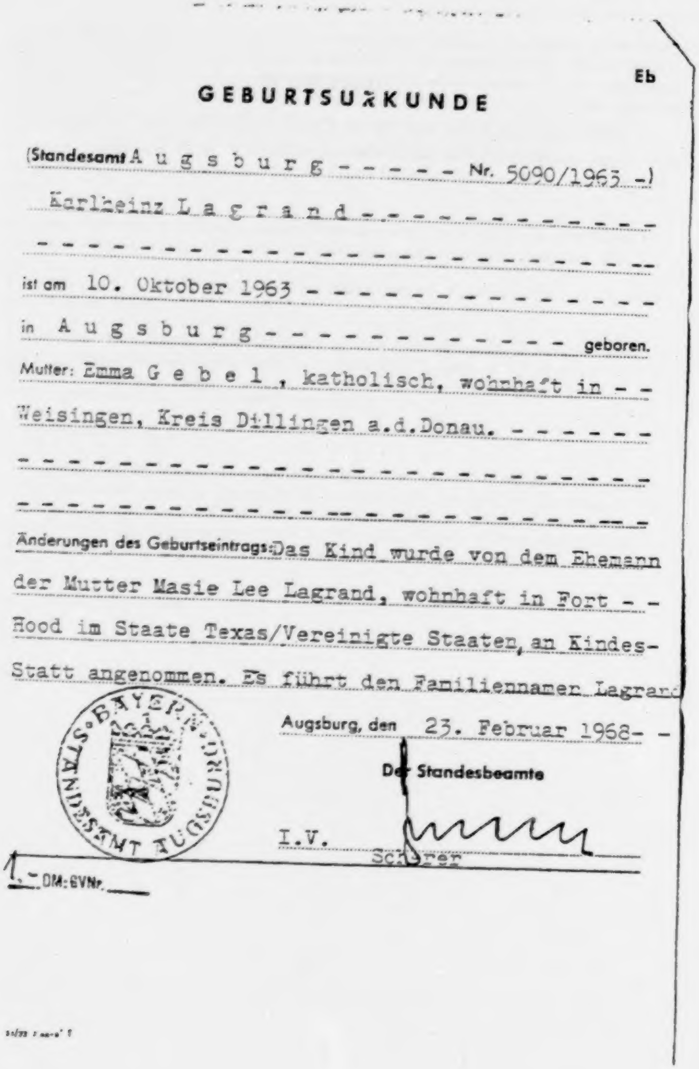
[61] *Id.*, p. 672; emphasis added.

[62] *Op. cit. supra* note 27 at p. 683.

[63] *Op. cit. supra* note 33 at p. 158.

Annex MG 40

CERTIFICATES OF BIRTH OF KARL AND WALTER LAGRAND. PASSPORT OF EMMA LAGRAND, NÉE GEBEL



Eb

GEBURTSURKUNDE

(Standesamt Augsburg - - - - - Nr. 5090/1963 -)

Karlheinz Lagrand - - - - - - - - - - - -

- -

ist am 10. Oktober 1963 - - - - - - - - - - - - -

in Augsburg - - - - - - - - - - - - geboren.

Mutter: Emma Gebel, katholisch, wohnhaft in - - Weisingen, Kreis Dillingen a.d.Donau. - - - - - -

- -

- -

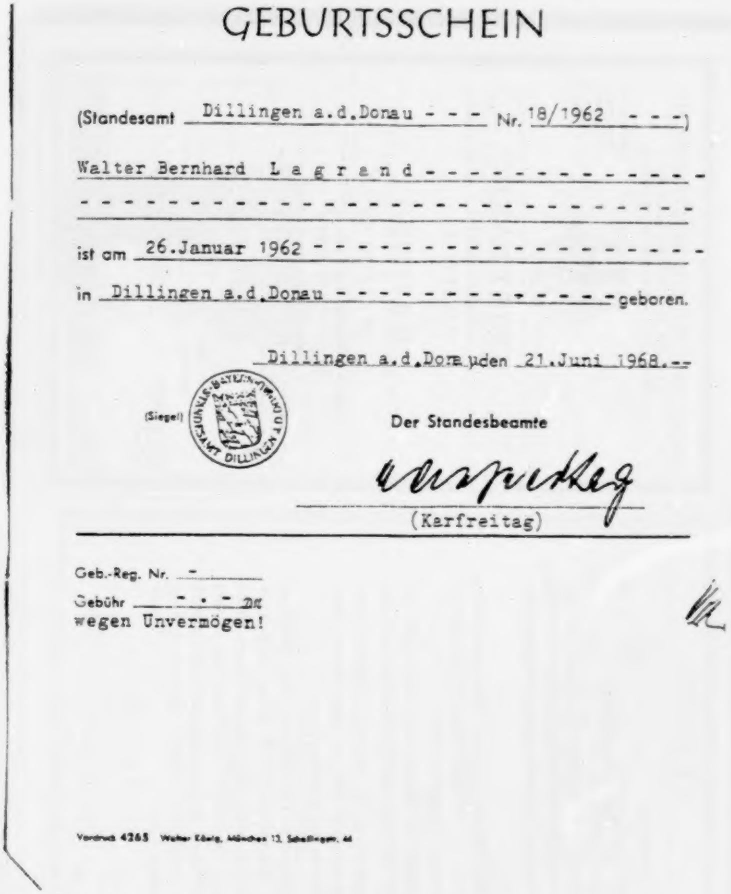
Änderungen des Geburtseintrags: Das Kind wurde von dem Ehemann der Mutter Masie Lee Lagrand, wohnhaft in Fort - - Hood im Staate Texas/Vereinigte Staaten, an Kindes-Statt angenommen. Es führt den Familiennamen Lagran

Augsburg, den 23. Februar 1968- -

Der Standesbeamte

I.V. Scherer

1,- DM: GVNr.



GEBURTSSCHEIN

(Standesamt Dillingen a.d.Donau - - - Nr. 18/1962 - - -)

Walter Bernhard Lagrand - - - - - - - - - - - - -

- -

ist am 26.Januar 1962 - - - - - - - - - - - - - - - - - -

in Dillingen a.d.Donau - - - - - - - - - - - - - geboren.

Dillingen a.d.Donau, den 21.Juni 1968.--

(Siegel)

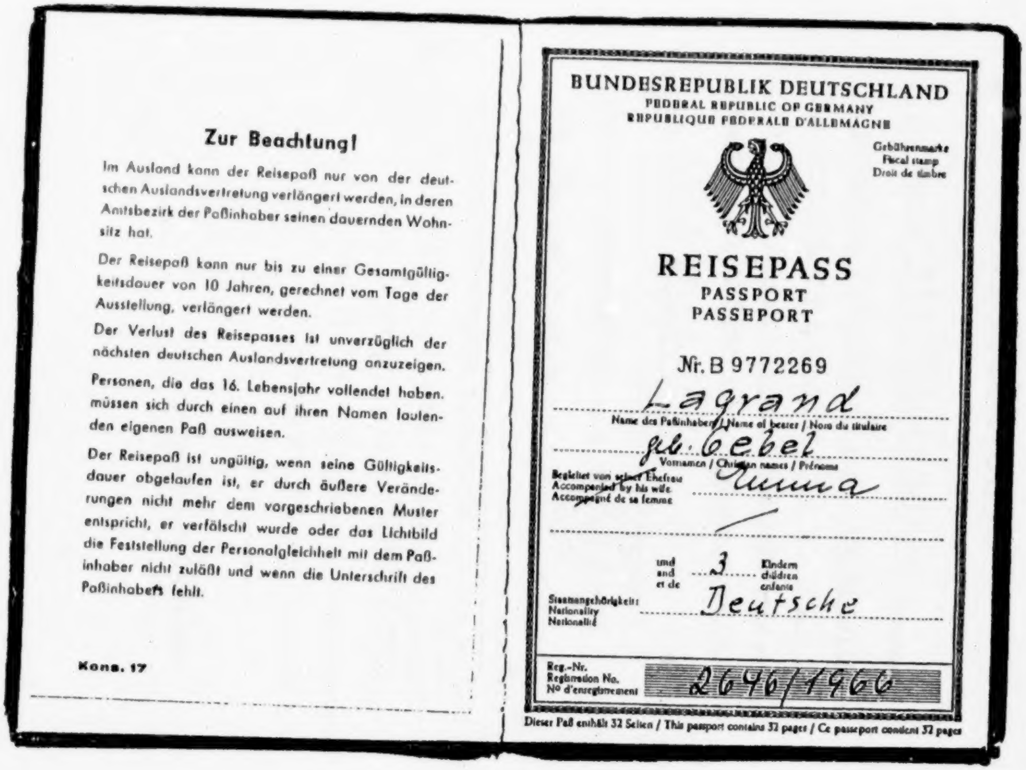
Der Standesbeamte

(Karfreitag)

Geb.-Reg. Nr. -

Gebühr - . - DM
wegen Unvermögen!

Vordruck 4265 Walter König, München 13, Schellingstr. 44



Zur Beachtung!

Im Ausland kann der Reisepaß nur von der deutschen Auslandsvertretung verlängert werden, in deren Amtsbezirk der Paßinhaber seinen dauernden Wohnsitz hat.

Der Reisepaß kann nur bis zu einer Gesamtgültigkeitsdauer von 10 Jahren, gerechnet vom Tage der Ausstellung, verlängert werden.

Der Verlust des Reisepasses ist unverzüglich der nächsten deutschen Auslandsvertretung anzuzeigen.

Personen, die das 16. Lebensjahr vollendet haben, müssen sich durch einen auf ihren Namen lautenden eigenen Paß ausweisen.

Der Reisepaß ist ungültig, wenn seine Gültigkeitsdauer abgelaufen ist, er durch äußere Veränderungen nicht mehr dem vorgeschriebenen Muster entspricht, er verfälscht wurde oder das Lichtbild die Feststellung der Personalgleichheit mit dem Paßinhaber nicht zuläßt und wenn die Unterschrift des Paßinhabers fehlt.

Kons. 17

BUNDESREPUBLIK DEUTSCHLAND
FEDERAL REPUBLIC OF GERMANY
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

Gebührenmarke
Fiscal stamp
Droit de timbre

REISEPASS
PASSPORT
PASSEPORT

Nr. B 9772269

Lagrand
Name des Paßinhabers / Name of bearer / Nom du titulaire

geb. Gebel
Vornamen / Christian names / Prénoms

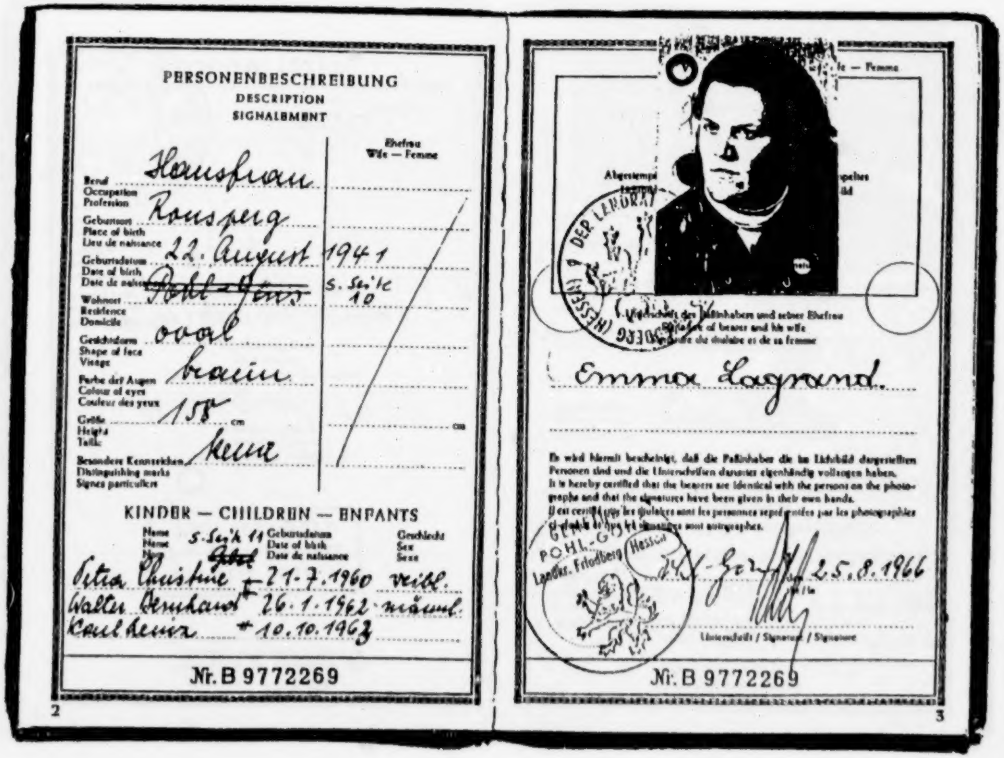
Emma
Begleitet von ~~seiner~~ Ehefrau
Accompanied by his wife
Accompagné de sa femme

und / and / et de 3 Kindern / children / enfants

Staatsangehörigkeit / Nationality / Nationalité: Deutsche

Reg.-Nr. / Registration No. / Nº d'enregistrement: 2646/1966

Dieser Paß enthält 32 Seiten / This passport contains 32 pages / Ce passeport contient 32 pages



PERSONENBESCHREIBUNG
DESCRIPTION
SIGNALEMENT

Ehefrau
Wife — Femme

Beruf / Occupation / Profession: Hausfrau

Geburtsort / Place of birth / Lieu de naissance: Rausperg

Geburtsdatum / Date of birth / Date de naissance: 22. August 1941

Wohnort / Residence / Domicile: ~~Pohl-Göns~~ s. Seite 10

Gesichtsform / Shape of face / Visage: oval

Farbe der Augen / Colour of eyes / Couleur des yeux: braun

Größe / Height / Taille: 158 cm

Besondere Kennzeichen / Distinguishing marks / Signes particuliers: keine

KINDER — CHILDREN — ENFANTS

Name / Name / Nom s. Seite 11 ~~Gebl.~~	Geburtsdatum / Date of birth / Date de naissance	Geschlecht / Sex / Sexe
Petra Christine	† 21-7.1960	weibl.
Walter Bernhard	† 26.1.1962	männl.
Karl Heinz	† 10.10.1963	

Nr. B 9772269

2

Unterschrift des Paßinhabers und seiner Ehefrau
Signature of bearer and his wife
Signature du titulaire et de sa femme

Emma Lagrand.

Es wird hiermit bescheinigt, daß die Paßinhaber die im Lichtbild dargestellten Personen sind und die Unterschriften darunter eigenhändig vollzogen haben.
It is hereby certified that the bearers are identical with the persons on the photographs and that the signatures have been given in their own hands.
Il est certifié que les titulaires sont les personnes représentées par les photographies et que leurs signatures sont autographes.

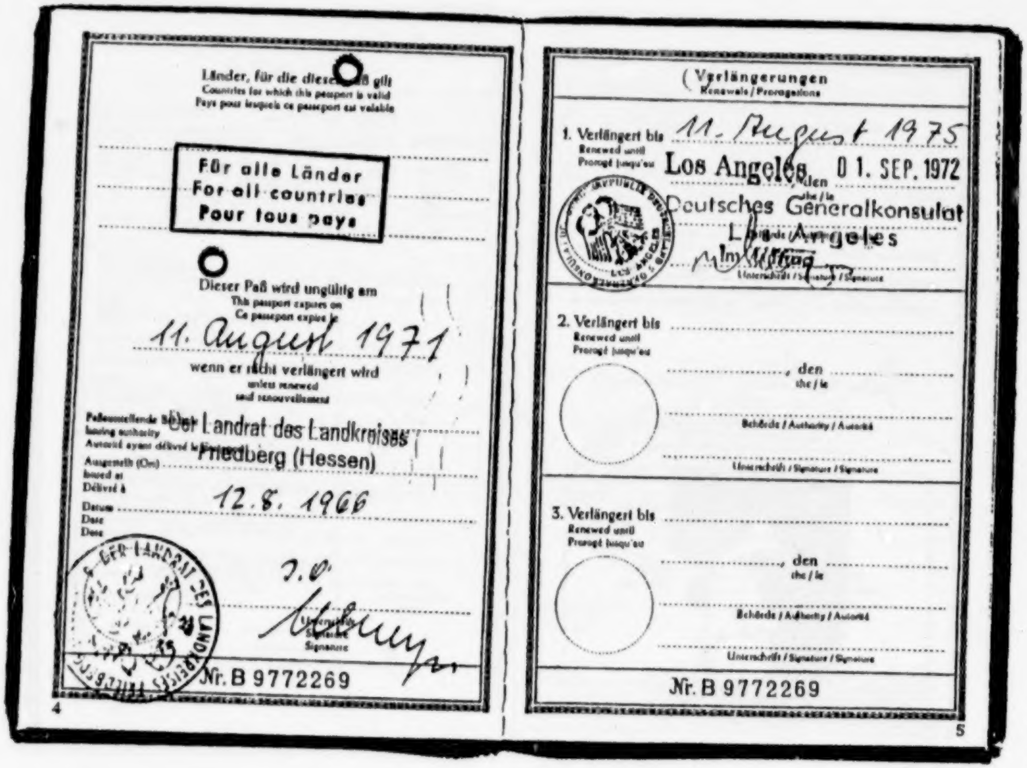
Gem. Pohl-Göns, Landkr. Friedberg (Hessen)

25.8.1966

Unterschrift / Signature / Signature

Nr. B 9772269

3



Länder, für die diese[illegible]ß gilt
Countries for which this passport is valid
Pays pour lesquels ce passeport est valable

Für alle Länder
For all countries
Pour tous pays

Dieser Paß wird ungültig am
This passport expires on
Ce passeport expire le

11. August 1971

wenn er nicht verlängert wird
unless renewed
sauf renouvellement

Paßausstellende Behörde / Issuing authority / Autorité ayant délivré le passeport: Der Landrat des Landkreises Friedberg (Hessen)

Ausgestellt (Ort) / Issued at / Délivré à

Datum / Date / Date: 12.8.1966

I.A.

Unterschrift / Signature / Signature

Nr. B 9772269

4

Verlängerungen
Renewals / Prorogations

1. Verlängert bis / Renewed until / Prorogé jusqu'au: 11. August 1975

Los Angeles, den / the / le 01. SEP. 1972

Deutsches Generalkonsulat Los Angeles

Im Auftrag

Unterschrift / Signature / Signature

2. Verlängert bis / Renewed until / Prorogé jusqu'au

……, den / the / le ……

Behörde / Authority / Autorité

Unterschrift / Signature / Signature

3. Verlängert bis / Renewed until / Prorogé jusqu'au

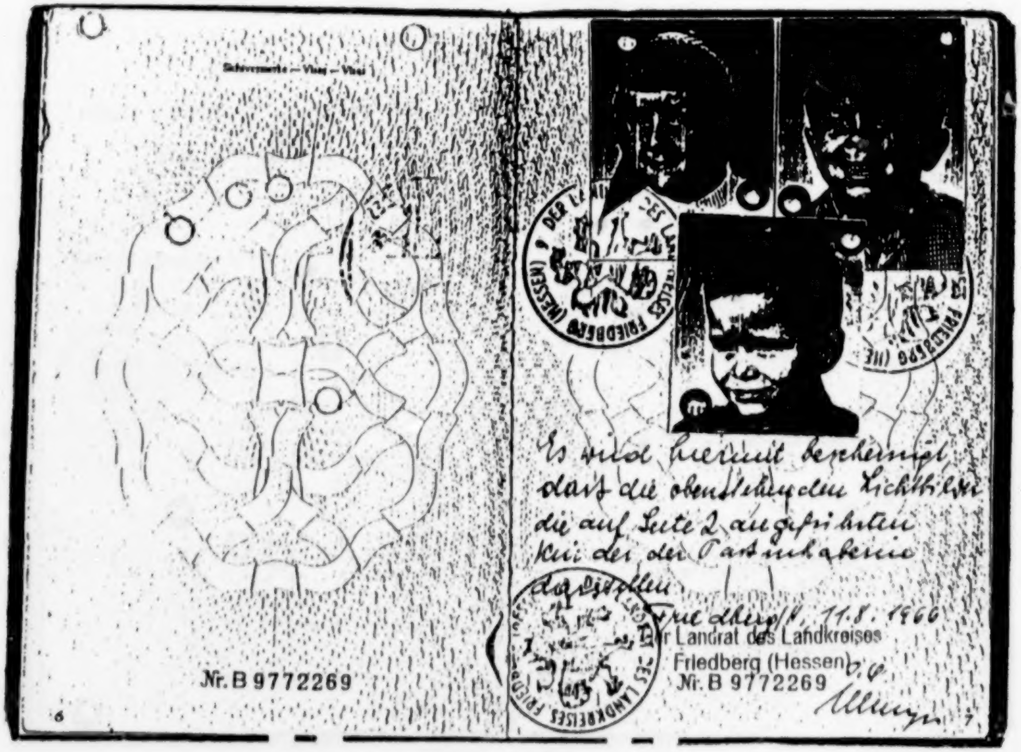
……, den / the / le ……

Behörde / Authority / Autorité

Unterschrift / Signature / Signature

Nr. B 9772269

5



Sichtvermerke — Visa — Visas

Nr. B 9772269

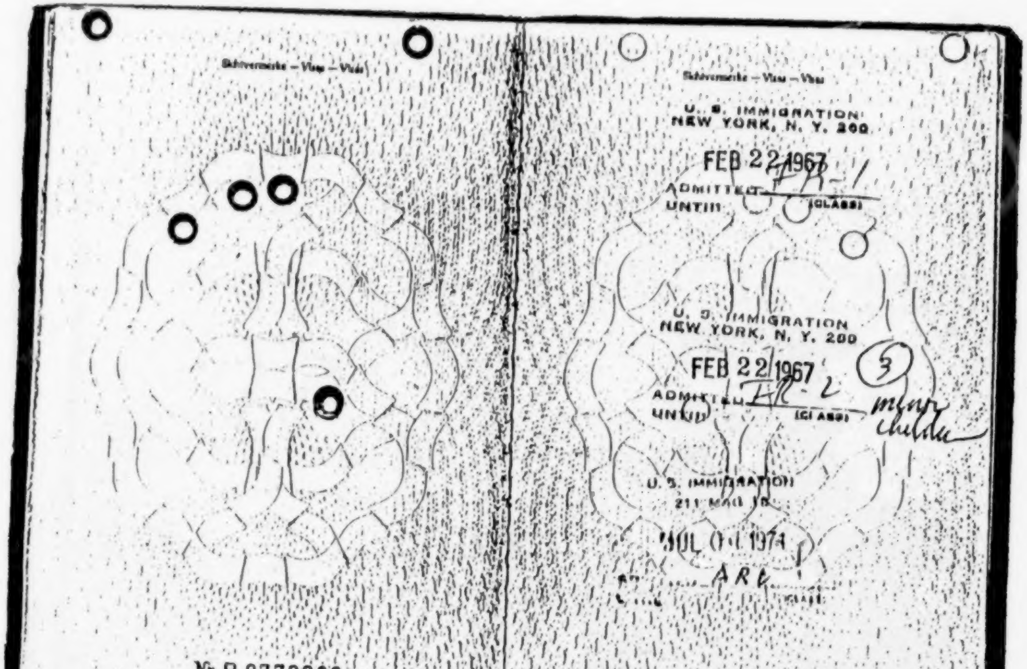
6

Es wird hiermit bescheinigt, dass die obenstehenden Lichtbilder die auf Seite 2 aufgeführten Kinder der Passinhaberin darstellen.

Friedberg/H., 11.8.1966

Der Landrat des Landkreises
Friedberg (Hessen) I.A.
Nr. B 9772269

7



Sichtvermerke — Visa — Visa

Nr. B 9772269

8

Sichtvermerke — Visa — Visa

U. S. IMMIGRATION
NEW YORK, N. Y. 200

FEB 22 1967
ADMITTED FA-1
UNTIL (CLASS)

U. S. IMMIGRATION
NEW YORK, N. Y. 200

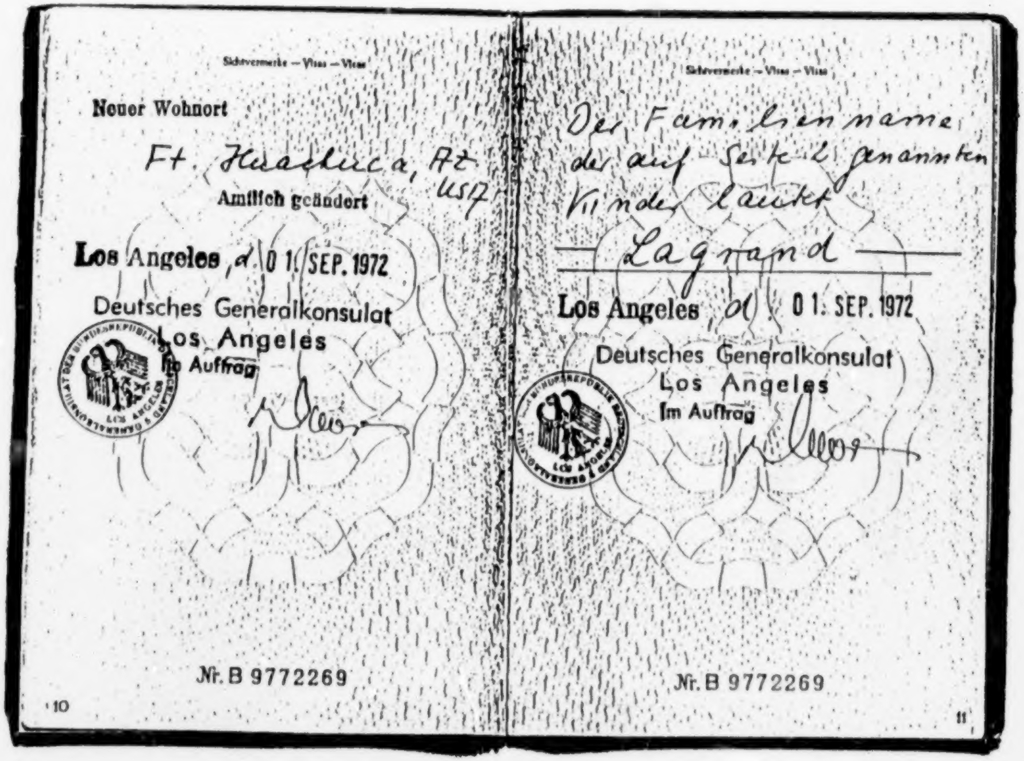
FEB 22 1967 ③
ADMITTED FA-2 minor children
UNTIL (CLASS)

U. S. IMMIGRATION
211 MAG 18

JUL 01 1974
ARL

Nr. B 9772269

9



Sichtvermerke — Visas — Visas

Neuer Wohnort

Ft. Huachuca, Az USA

Amtlich geändert

Los Angeles, d. 01. SEP. 1972

Deutsches Generalkonsulat
Los Angeles
Im Auftrag

Nr. B 9772269

10

Sichtvermerke — Visas — Visas

Der Familienname
der auf Seite 2 genannten
Kinder lautet
Lagrand

Los Angeles d. 01. SEP. 1972

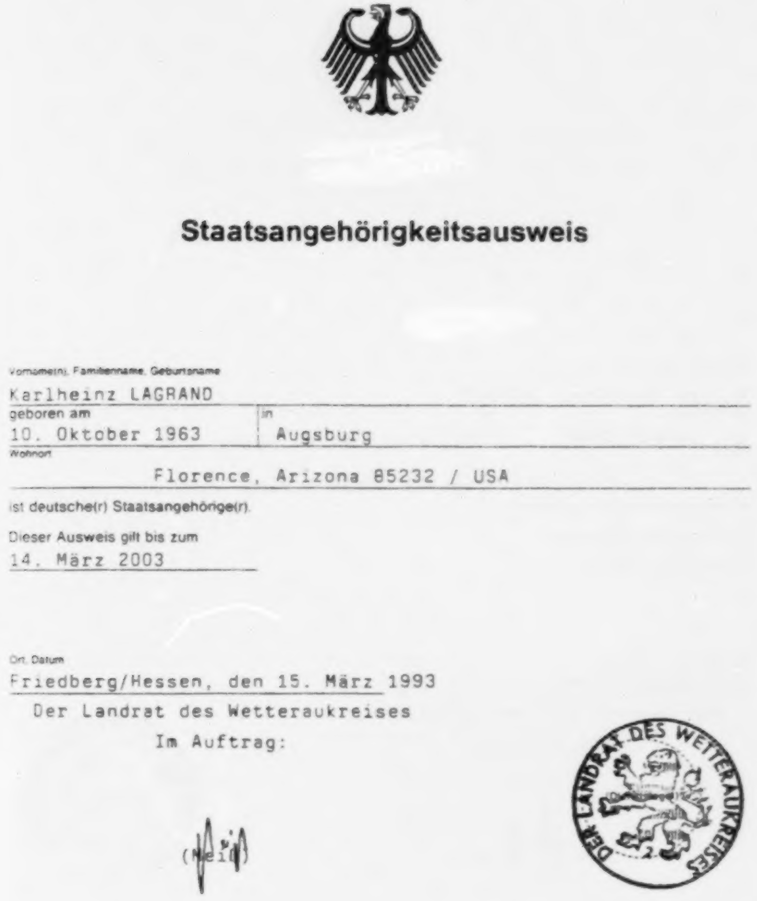
Deutsches Generalkonsulat
Los Angeles
Im Auftrag

Nr. B 9772269

11

Annex MG 41

CERTIFICATES OF GERMAN CITIZENSHIP
OF KARL AND WALTER LAGRAND
(15 MARCH 1993)



Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname
Karlheinz LAGRAND

geboren am
10. Oktober 1963

in
Augsburg

Wohnort
Florence, Arizona 85232 / USA

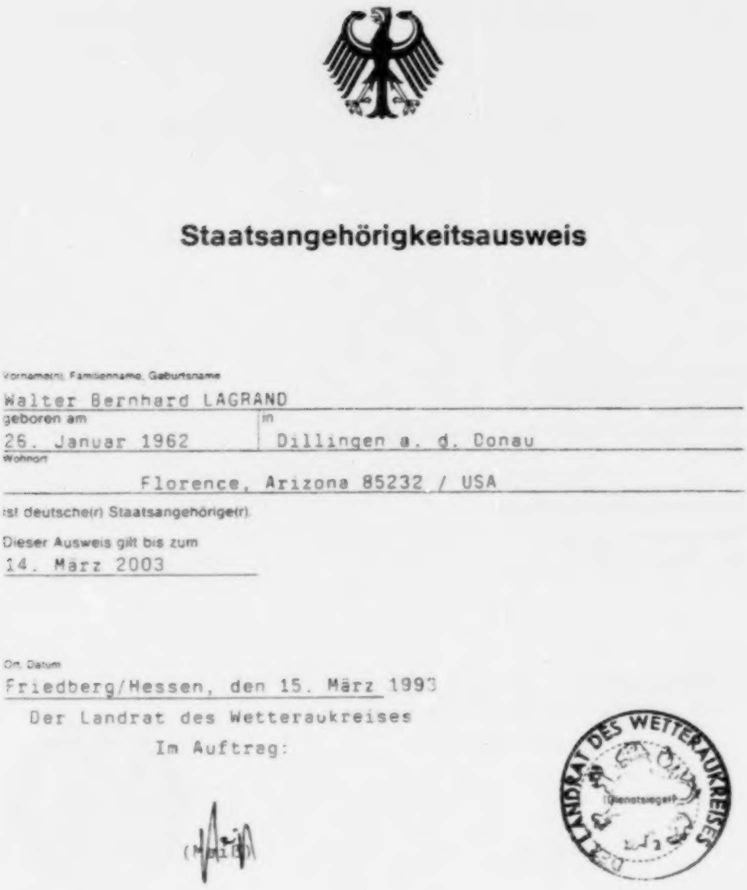
ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum
14. März 2003

Ort, Datum
Friedberg/Hessen, den 15. März 1993

Der Landrat des Wetteraukreises
Im Auftrag:

(Heil)



Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname
Walter Bernhard LAGRAND

geboren am
26. Januar 1962

in
Dillingen a. d. Donau

Wohnort
Florence, Arizona 85232 / USA

ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum
14. März 2003

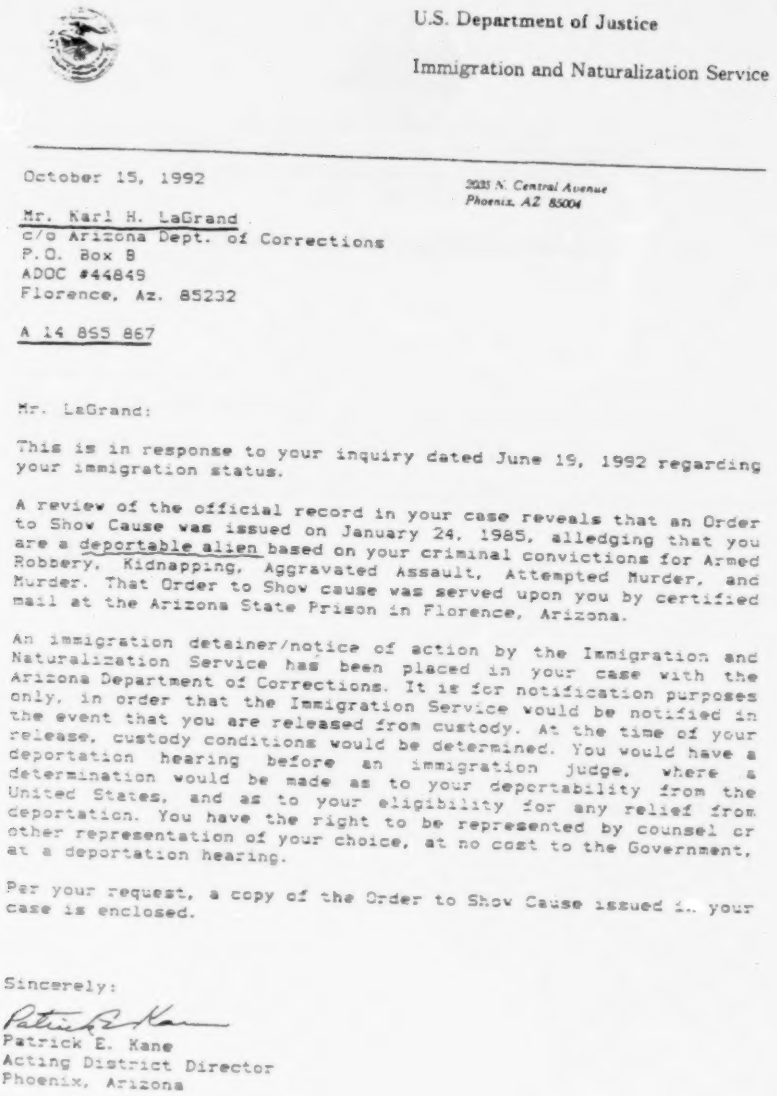
Ort, Datum
Friedberg/Hessen, den 15. März 1993

Der Landrat des Wetteraukreises
Im Auftrag:

(Maier)

Annex MG 42

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, LETTERS TO KARL AND WALTER LAGRAND (15 OCTOBER 1992)



U.S. Department of Justice

Immigration and Naturalization Service

October 15, 1992

2035 N. Central Avenue
Phoenix, AZ 85004

Mr. Karl H. LaGrand
c/o Arizona Dept. of Corrections
P.O. Box B
ADOC #44849
Florence, Az. 85232

A 14 855 867

Mr. LaGrand:

This is in response to your inquiry dated June 19, 1992 regarding your immigration status.

A review of the official record in your case reveals that an Order to Show Cause was issued on January 24, 1985, alledging that you are a deportable alien based on your criminal convictions for Armed Robbery, Kidnapping, Aggravated Assault, Attempted Murder, and Murder. That Order to Show cause was served upon you by certified mail at the Arizona State Prison in Florence, Arizona.

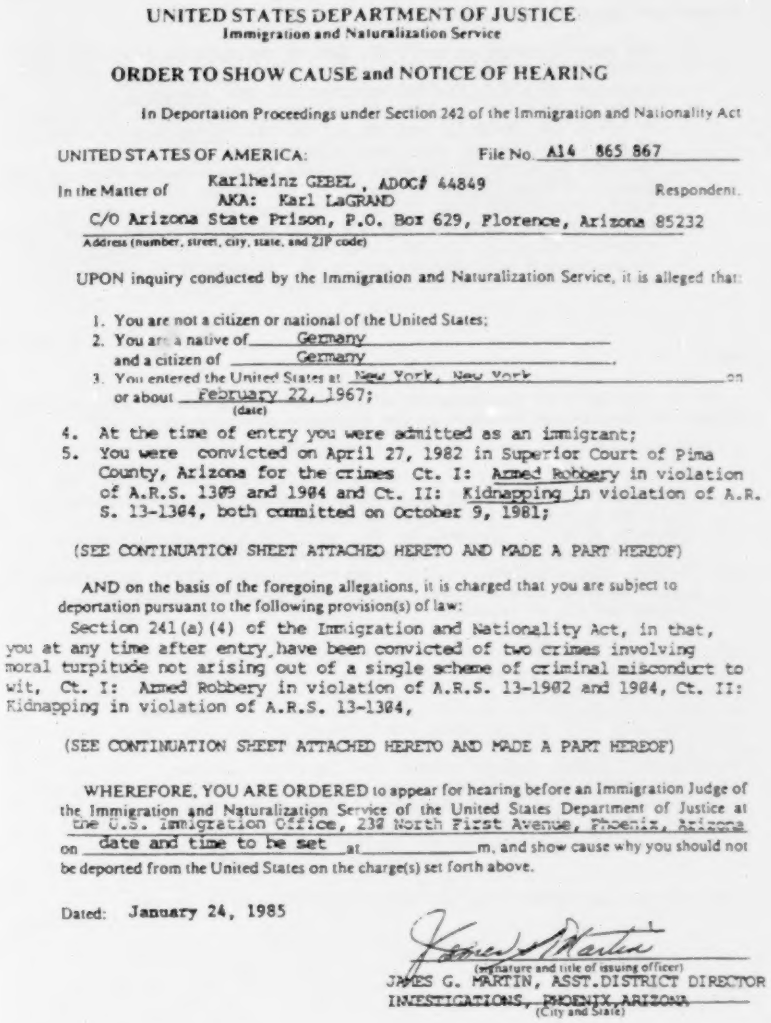
An immigration detainer/notice of action by the Immigration and Naturalization Service has been placed in your case with the Arizona Department of Corrections. It is for notification purposes only, in order that the Immigration Service would be notified in the event that you are released from custody. At the time of your release, custody conditions would be determined. You would have a deportation hearing before an immigration judge, where a determination would be made as to your deportability from the United States, and as to your eligibility for any relief from deportation. You have the right to be represented by counsel or other representation of your choice, at no cost to the Government, at a deportation hearing.

Per your request, a copy of the Order to Show Cause issued in your case is enclosed.

Sincerely:

Patrick E. Kane

Patrick E. Kane
Acting District Director
Phoenix, Arizona



UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A14 865 867

In the Matter of Karlheinz GEBEL, ADOC# 44849
AKA: Karl LaGRAND
Respondent.

C/O Arizona State Prison, P.O. Box 629, Florence, Arizona 85232
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Germany
   and a citizen of Germany.
3. You entered the United States at New York, New York on
   or about February 22, 1967;
   (date)
4. At the time of entry you were admitted as an immigrant;
5. You were convicted on April 27, 1982 in Superior Court of Pima County, Arizona for the crimes Ct. I: Armed Robbery in violation of A.R.S. 1309 and 1904 and Ct. II: Kidnapping in violation of A.R.S. 13-1304, both committed on October 9, 1981;

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct to wit, Ct. I: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. II: Kidnapping in violation of A.R.S. 13-1304,

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at the U.S. Immigration Office, 230 North First Avenue, Phoenix, Arizona on date and time to be set at ________ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 24, 1985

James Martin
(signature and title of issuing officer)
JAMES G. MARTIN, ASST.DISTRICT DIRECTOR
INVESTIGATIONS, PHOENIX,ARIZONA
(City and State)

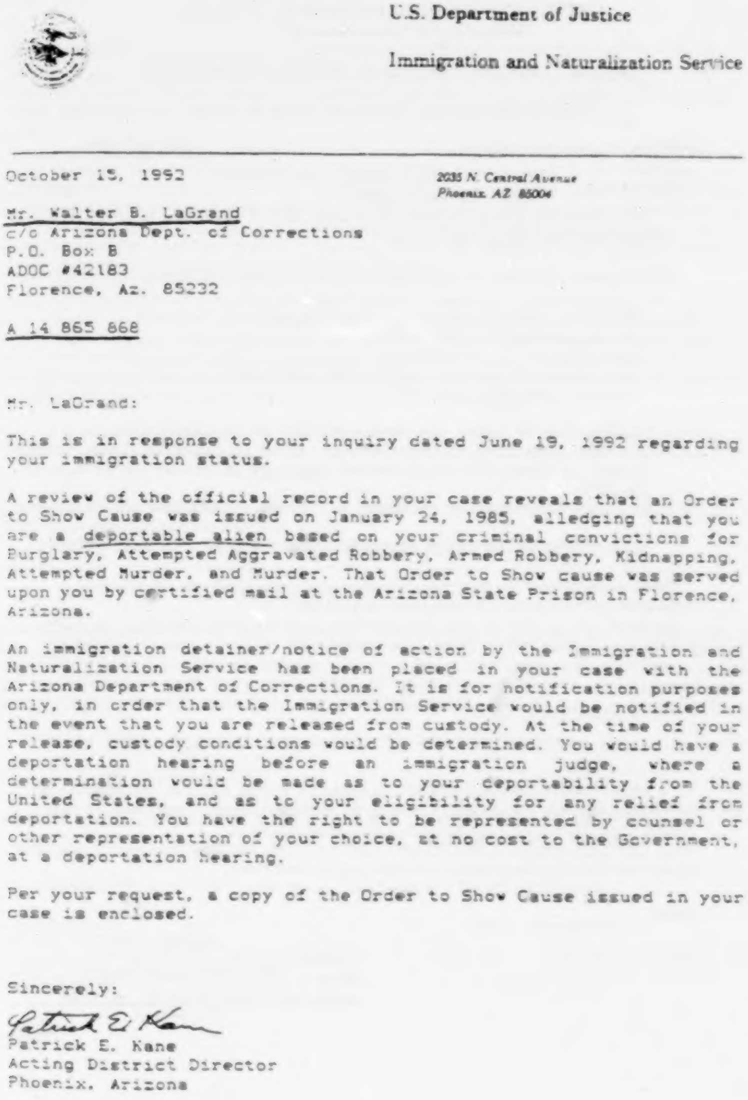
Allegations Con't

6. You were convicted on April 27, 1981 in the Superior Court Pima County, Arizona for the crimes of Ct. III: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304, Ct. V: Aggravated Assault in violation of A.R.S. 13-1204(A)(2) and (B) and Ct. VI: Kidnapping in violation of A.R.S. 13-1304 all committed on October 12, 1981;
7. You were convicted on December 14, 1984 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304, all committed on January 7, 1992.

Con't

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Ct. III: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304, Ct. V: Aggravated Assault in violation of A.R.S. 13-1204(A)(2) and (B), Ct. VI: Kidnapping in violation of A.R.S. 13-1304, Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304.



U.S. Department of Justice

Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix AZ 85004

October 15, 1992

Mr. Walter B. LaGrand
c/o Arizona Dept. of Corrections
P.O. Box B
ADOC #42183
Florence, Az. 85232

A 14 865 868

Mr. LaGrand:

This is in response to your inquiry dated June 19, 1992 regarding your immigration status.

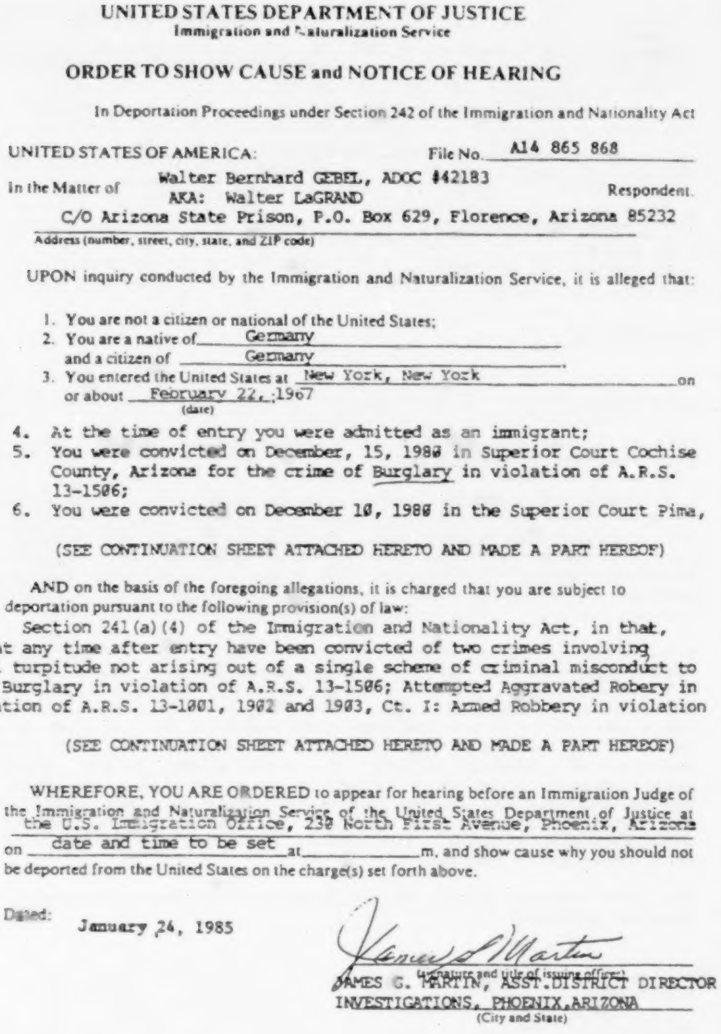
A review of the official record in your case reveals that an Order to Show Cause was issued on January 24, 1985, alledging that you are a deportable alien based on your criminal convictions for Burglary, Attempted Aggravated Robbery, Armed Robbery, Kidnapping, Attempted Murder, and Murder. That Order to Show cause was served upon you by certified mail at the Arizona State Prison in Florence, Arizona.

An immigration detainer/notice of action by the Immigration and Naturalization Service has been placed in your case with the Arizona Department of Corrections. It is for notification purposes only, in order that the Immigration Service would be notified in the event that you are released from custody. At the time of your release, custody conditions would be determined. You would have a deportation hearing before an immigration judge, where a determination would be made as to your deportability from the United States, and as to your eligibility for any relief from deportation. You have the right to be represented by counsel or other representation of your choice, at no cost to the Government, at a deportation hearing.

Per your request, a copy of the Order to Show Cause issued in your case is enclosed.

Sincerely:

Patrick E. Kane
Patrick E. Kane
Acting District Director
Phoenix, Arizona



UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A14 865 868

In the Matter of Walter Bernhard GEBEL, ADOC #42183
AKA: Walter LaGRAND Respondent.

C/O Arizona State Prison, P.O. Box 629, Florence, Arizona 85232
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Germany
   and a citizen of Germany.
3. You entered the United States at New York, New York on
   or about February 22, 1967
   (date)
4. At the time of entry you were admitted as an immigrant;
5. You were convicted on December, 15, 1980 in Superior Court Cochise County, Arizona for the crime of Burglary in violation of A.R.S. 13-1506;
6. You were convicted on December 10, 1980 in the Superior Court Pima,

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct to wit; Burglary in violation of A.R.S. 13-1506; Attempted Aggravated Robery in violation of A.R.S. 13-1001, 1902 and 1903, Ct. I: Armed Robbery in violation

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at the U.S. Immigration Office, 230 North First Avenue, Phoenix, Arizona on date and time to be set at ______ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 24, 1985

(signature and title of issuing officer)
JAMES G. MARTIN, ASST. DISTRICT DIRECTOR
INVESTIGATIONS, PHOENIX, ARIZONA
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDING

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATIO WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by a attorney or other individual authorized and qualified to represent persons before the Immigration and Na uralization Service. You should bring with you any affidavits or other documents which you desire to ha considered in connection with your case. If any document is in a foreign language, you should bring th original and certified translation thereof. If you wish to have the testimony of any witnesses considere you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Orde to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity t present evidence on your own behalf, to examine any evidence presented by the Government, to object, o proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Gov ernment. Failure to attend the hearing at the time and place designated hereon may result in a determina tion being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, in cluding the privilege of departing voluntarily, for which you may appear eligible. You will be given a rea sonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and deten tion by the Immigration and Naturalization Service.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

____
(signature of respondent)

Before:

____
(signature and title of witnessing officer)

____
(date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 1-25-85 (date) in the following manner:

Certified mail
W/I-618 & Legal Notice

(signature and title of employee)
Clerk-Typist

Allegations Con't

County, Arizona for the crime of Attempted Aggravated Robbery in violation of A.R.S. 13-1001, 1902 and 1903, committed on or about June 18, 1980;

7. You were convicted on April 27, 1982 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Armed Robbery in violation of A.R.S. 13-1902 and 1904 and Ct. II: Kidnapping in violation of A.R.S. 13-1304, both committed on October 9, 1981;

8. You were convicted on December 14, 1984 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304, all committed on January 7, 1982.

Con't

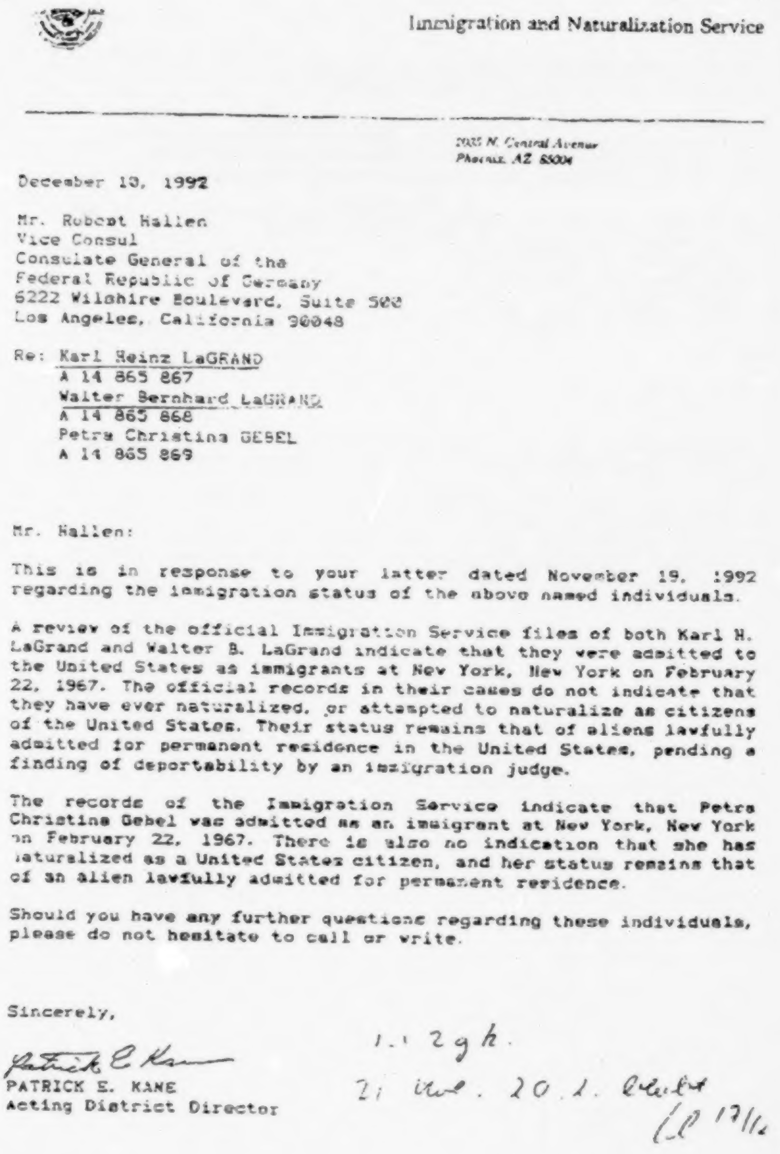
AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

of A.R.S. 13-1902 and 1904, Ct. II: Kidnapping in violation of A.R.S. 13-1304, Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304

Annex MG 43

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, LETTER TO THE GERMAN CONSULATE GENERAL IN LOS ANGELES

(10 DECEMBER 1992)



Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix, AZ 85004

December 10, 1992

Mr. Robert Hallen
Vice Consul
Consulate General of the
Federal Republic of Germany
6222 Wilshire Boulevard, Suite 500
Los Angeles, California 90048

Re: Karl Heinz LaGRAND
A 14 865 867
Walter Bernhard LaGRAND
A 14 865 868
Petra Christina GEBEL
A 14 865 869

Mr. Hallen:

This is in response to your letter dated November 19, 1992 regarding the immigration status of the above named individuals.

A review of the official Immigration Service files of both Karl H. LaGrand and Walter B. LaGrand indicate that they were admitted to the United States as immigrants at New York, New York on February 22, 1967. The official records in their cases do not indicate that they have ever naturalized, or attempted to naturalize as citizens of the United States. Their status remains that of aliens lawfully admitted for permanent residence in the United States, pending a finding of deportability by an immigration judge.

The records of the Immigration Service indicate that Petra Christina Gebel was admitted as an immigrant at New York, New York on February 22, 1967. There is also no indication that she has naturalized as a United States citizen, and her status remains that of an alien lawfully admitted for permanent residence.

Should you have any further questions regarding these individuals, please do not hesitate to call or write.

Sincerely,

Patrick E. Kane
PATRICK E. KANE
Acting District Director

1.) zgK.
2.) Wv. 20.1. [illegible]
[illegible] 17/1

Annex MG 44

INTER-AMERICAN COURT OF HUMAN RIGHTS, REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE GOVERNMENT OF THE UNITED MEXICAN STATES

(17 NOVEMBER 1997)

REQUEST FOR AN ADVISORY OPINION
SUBMITTED BY THE GOVERNMENT OF THE UNITED MEXICAN STATES
(COURTESY TRANSLATION, AS REVIEWED BY THE MEXICAN MINISTRY OF FOREIGN AFFAIRS)

I. CONSIDERATIONS THAT GAVE RISE TO THE REQUEST

The Government of Mexico has been making numerous representations on behalf of 38 Mexican nationals sentenced to death in ten states of the United States of America[1]. The receiving State did not inform these persons, either immediately or subsequently, of their right to communicate with the Mexican consular authorities, as it is required to do by Article 36 of the Vienna Convention on Consular Relations[2]. Inasmuch as this provision contains obligations binding on the receiving State and not on the affected individuals, the Government of Mexico considers that if the authorities of the receiving State fail to inform the interested parties of the rights conferred on them by that instrument in a timely fashion, the authorities deprive them of the effective exercise and enjoyment of their rights. Accordingly, the Government of Mexico has energetically protested against this irregularity in the bilateral sphere.

Two Mexican nationals in the situation described above were recently executed, following rejection of their claims of failure to receive the timely notification referred to in Article 36. Although it is a generally accepted principle in inter-American sphere that every federal State constitutes a single entity in international law[3], in the first case the authorities of Texas argued that this constituent unit was not a signatory to the Vienna Convention. In the second case, the federal authorities of the United States of America offered "profound apologies to the Government of Mexico after the application of the death penalty by the State of Virginia. It bears noting that the State of Texas recently set execution dates the first suspended and the second postponed in two other cases concerning Mexican nationals in which Article 36 of the Vienna Convention was not observed either.

In the view of the Government of Mexico, the injury suffered by detained aliens as a result of failure to notify them of their rights under Article 36 renders void their right to due process. From the moment of their arrest, aliens find themselves at a disadvantage because of language differences, their lack of knowledge of the legal system of the country in which they will be tried, their lack of knowledge of their constitutional and legal rights at the moment of their detention, and the risk of not obtaining adequate legal representation, all of which may affect the outcome of their trials. To put the problem in its proper perspective, attention should be drawn to various guarantees that international human rights law confers on persons accused of crimes for which capital punishment may be imposed, and to the importance of the consular function within the framework of such guarantees in the case of aliens.

A. MINIMUM GUARANTEES IN PROCEEDINGS FOR CRIMES PUNISHABLE BY THE DEATH PENALTY

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[1] Arkansas, Arizona, California, North Carolina, Florida, Illinois, Ohio, Oregon, Nevada, and Texas.

[2] Vienna, Austria, 24/04/63, U.N.T.S, 8632 (entry into force: 19/03/67). Article VI of the bilateral Consular Convention signed by Mexico and the United States of America, 12/08/42, U.N.T.S. 301, contains similar provisions.

[3] Convention on the Rights and Duties of States, Montevideo, 26/12/33, Art.2.

e American States recognize that in the specific case of the death penalty, the fundamental hts of a human being must be scrupulously observed and respected, since the application of death penalty "has irrevocable consequences, forecloses the correction of judicial error, and cludes any possibility of changing or rehabilitating those convicted[4]".

e grave consequences of the execution of capital punishment are the irreparable loss of that st fundamental of human rights that is the right to life, from whose enjoyment springs that of all er rights. It is therefore essential to ensure that the imposition and application of this nishment strictly observes in all cases the provisions set forth in human rights instruments, ch establish clear restrictions as far as both its imposition and its application are concerned.

e Inter-American Court, in interpreting Article 4 of the American Convention on Human Rights in ard to the right to life, observed that, "[t]he text of the article as a whole reveals a clear dency to restrict the scope of this penalty both as far as its imposition and its application are ncerned" and that "[t]he subject is governed by a substantive principle laid down in the first agraph, which proclaims that 'every person has the right to have his life respected', and by the cedural principle that 'no one shall be arbitrarily deprived of his life. ...' Thus, three types of tations can be seen to be applicable to States Parties which have not abolished the death nalty. **First, the imposition or application of this sanction is subject to certain procedural quirements whose compliance must be strictly observed and reviewed**[5]."

e Inter-American Commission on Human Rights (ICHR) has observed that death sentences ich are judicially imposed **without fulfilling the judicial guarantees** constitute a violation of e right to life[6]. In an individual case, the ICHR concluded that the execution of two persons for mes committed when they were under 18 years of age constituted a violation of the right to life d also, in the circumstances of that case, a violation of the right to equal protection of the law shrined in the American Declaration of the Rights and Duties of Man[7].

e United Nations General Assembly, by Resolutions 35/172 and 36/22 of December 15, 1980 d November 9, 1981, urged all countries to avoid the practice of arbitrary executions, and to **spect the procedural guarantees set forth in Articles 6, 14 and 15 of the International venant on Civil and Political Rights**. In turn, the Special Rapporteur on Summary and bitrary Executions declared that the concept of arbitrary or summary execution includes ecutions "resulting from a sentence passed through a proceeding without guarantees and, in rticular, **without the minimum procedural guarantees enshrined in Article 14 of the ternational Covenant on Civil and Political Rights**[8]."

ticle 6 of the International Covenant on Civil and Political Rights stipulates that the death penalty ay be imposed only "in accordance with the law in force at the time of the commission of the ime and not contrary to the provisions of the present Covenant[9]." This precept must be terpreted in accordance with other provisions of the Covenant, which, read as a whole, prohibits uel methods of execution and requires, as a minimum in terms of the execution, that it cause no

---

Protocol to the American Convention on Human Rights concerning the Abolition of the Death Penalty, Asunción, raguay, 8/06/90, Preamble.

Restrictions to the Death Penalty, Advisory Opinion OC-3/83 of September 8, 1983, paragraphs 52, 53 and 55 mphasis added).

See for example, Report on Chile (1974), *Diez Años*, page 251: Report on Cuba (1983), page 97, para. 17.

Roach and Pinkerton versus USA, Decision 3/87, Case 9647.

E/CN.4/1983/16, ara. 66 (emphasis added).

For the Human Rights Committee's interpretation of this clause, see Mbenge v. Zaire (No. 16/1997), Report 1983, ges 142-3, para. 17.

physical or spiritual suffering beyond the loss of life[10]. Every law that stipulates the death penalty must meet the minimum guarantees of a fair trial that are established in Articles 14 and 15 of the Covenant[11]. The Human Rights Committee has stipulated that, in capital punishment cases, the duty of the States Parties to observe rigorously all the guarantees for a fair hearing established in Article 14 is particularly imperative. The Committee further observed that, in capital punishment cases, depending on the circumstances, prolongation of the proceedings may constitute, *per se*, a form of cruel, inhuman or degrading treatment[12].

When the persons involved are of foreign nationality, it is evident that the minimum penal guarantees embodied in human rights instruments must be applied and interpreted in compliance with the Vienna Convention. Otherwise, foreign accused persons and defendants would be deprived of a suitable means of making effective those guarantees in their particular circumstances, with irreparable results in capital punishment cases.

B. THE CONSULAR FUNCTION AND THE APPLICATION OF THE DEATH PENALTY TO ALIENS

The following are some of the measures that the Mexican consular authorities can adopt on behalf of Mexican nationals accused of crimes punishable by death or those already sentenced to death, gathered from experience acquired in cases that have taken place in the United States of America. As it will be observed, timely consular assistance can be a determinig factor in the outcome of the corresponding trials.

· The consular assistance granted from the moment of the arrest guarantees, *inter alia*, that a detained alien is made aware, **in his own language and in an accessible manner**, of his constitutional and legal rights in the country in which he is apprehended; that he is provided without delay with adequate legal assistance; that he is made aware of the possible legal consequences (application of the death penalty) of the crime of which he stands accused; that the manner in which the legal system functions in the country in which he is detained is explained to him; and, particularly, **that he is informed of his right not to incriminate himself and not to make any statement or confession before he has been provided with adequate legal counsel.**

· In the initial stages of the corresponding proceedings, the accused enjoys the right to be represented by legal counsel free of charge. However, this right is not necessarily maintained throughout the proceedings, particularly once the first appeals have been exhausted. In the experience of the Government of Mexico, there have been numerous cases in which the defendant was represented by public defenders whose workload, irrespective of their professional skills, was greater than the resources at their disposal for giving due attention to the case. Consular agents may take measures to ensure that the defendant or convicted person receives adequate legal defense throughout the proceedings; for instance, *via* bar associations or private law firms that possess the human and material resources to ensure thorough performance of the task. It has been observed that state laws in the United States of America are not uniform in regard to court-appointed legal defense.

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[10] M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 117. See Article 7 of the Covenant.

[11] In the cases of capital punishment against Zaire, Jamaica, and Trinidad and Tobago, the Committee insisted on strict compliance with the minimum guarantees. In the case of Mbenge v. Zaire, the Committee concluded that the imposition of the death penalty without the fulfillment of the minimum guarantees enshrined in Article 14(3) also constitutes a violation of Article 6(2). In Robinson v. Jamaica, the Committee established its repeated case law that "the need for legal assistance in cases of capital punishment is axiomatic." In default of legal counsel and in other cases of inequality that constituted an unfair trial, the Committee found that Article 14, paragraphs 1 and 3, had been violated and that those violations should be remedied by the victim's release. In Pinto v. Trinidad and Tobago, as in other cases, the Committee reiterated that stance, adding that legal assistance to the defendant in a capital punishment case should be granted in such a manner as to ensure justice adequately and effectively. See Nowak, *supra*, pp. 118-20.

[12] Reid v. Jamaica, No. 250/1987 (20 July 1990), paras. 11.6 and 12.2.

It bears noting that the adequate defense of a case involving crimes that carry the death penalty, or those for which the death penalty has already been imposed, often has an exhorbitant cost and is unusually time-consuming as compared to other kinds of cases. There is also the need for professional interpreters when aliens are involved. Nationals of the receiving State do not find themselves at this disadvantage, which may be attenuated in the case of aliens by the timely intervention of consular agents.

* Consular agents can assist the defense in obtaining evidence, including evidence that attests to "mitigating[13]" circumstances. These circumstances may persuade the jury to refrain from imposing the death penalty. Unlike persons who have been found guilty of crimes punishable by the death penalty and who are nationals of the State in which the case is tried, in the case of persons found guilty of such crimes who are not nationals of that State, the bulk of mitigating evidence is normally to be found abroad: school records, character witnesses, criminal and employment records, and so on. It must be said that, once capital punishment has been imposed, it is extremely difficult for a sentence to be reversed, and that early intervention by the consular authorities is the most accessible means of procuring that mitigating evidence, which usually requires extensive interviews and investigations in the defendants' place of origin.

In particular, consular assistance can facilitate: the hiring and payment of investigators by the Government of Mexico, should it be necessary, to help the defense attorneys accurately establish facts on which the outcome of the proceeding depends; the travel of lawyers or experts to Mexico to study or acquaint themselves with the environment in which the defendant was raised in order to gather evidence; the transport of relatives or defense witnesses from the State of origin to the receiving State; securing the opinion of the consulting attorneys of the consular authorities; ensuring that links of communication are established between the defendant or convicted person and his defense attorney, and, should the defense be inadequate, procuring adequate legal representation for the accused or convicted person; and even ensuring that the defendant has access to adequate interpretation. Without consular assistance from the State of their nationality, accused or convicted foreigners may remain virtually defenseless, which is not the case with nationals of the receiving State.

* Consular agents may act as assistants to the defense attorneys in the courts, or as *amicus curiae*, or may request their government to appoint an *ad hoc* official as *amicus curiae*, mindful of the nature of the trial, providing the courts with information on, *inter alia*, the relevant international norms when the laws and competent courts so permit. Consular agents may also help the defense in producing testimony from experts on the scope of the provisions of the Vienna Convention in order to ensure that the prosecutors, juries and competent courts are aware of the text and meaning of the provisions. The intervention of such experts is not necessary in the case of nationals of the receiving State. However, its absence in cases concerning aliens results in an imbalance that is difficult to remedy without the intervention of consular agents.

* Consular agents can keep other interested authorities and bodies of the State of origin -departments of the Executive Branch of the federal government, state governors, public human rights commissions, legislators, etc.- informed on the development of the case. These, in turn, can undertake whatever measures they deem appropriate within their respective spheres of competence, such as supporting the gathering of evidence referred to above.

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[13] On the subject of mitigating circumstances, see, for example, Soering v. United Kingdom, European Court of Human Rights, 11 E.H.R.R. 439 (1989), paras. 45-47.

"Consular agents may also visit the accused or convicted person with prior notification to the local authorities. The consular agents can also facilitate visits to the defendant or convicted person by his relatives and even by his lawyers. Mention should be made of the practice of some high-security penitentiaries that deny lawyers access to their clients during media interviews. In this way, consular visits not only render conditions more humane for the inmate and his relatives but also make the interested parties aware of the possible juridical consequences of their statements and act as a bridge for communication between defense attorneys and their clients when the former are not present. In addition, cultural and linguistic factors highlight the importance of consular visits to alien defendants and convicted persons who would otherwise find themselves at an obvious disadvantage *vis-à-vis* the nationals of the receiving State.

To illustrate the above, the Government of Mexico can cite specific cases, all of which were tried in the State of Texas, in which consular assistance was decisive in the outcome of the proceedings, despite the fact that the Mexican Government was unable to provide it from the moment of the detention because of non-compliance with Article 36 of the Vienna Convention. In the first case, tried in Jefferson County (case of Omar Ayala, abducted in Palau, Coahuila), imposition of the death penalty was avoided. In the second case, tried in Fort Bend County (case of Francisco Cardenas, a native of Celaya, Guanajuato), consular intervention helped in lifting the death sentence. In the third case, tried in Harris County (case of Ricardo Aldape, a native of Monterrey, Nuevo León), consular assistance helped in releasing the death row inmate, after fifteen years, for lack of evidence. As these cases show, far from constituting a harmless error, where capital punishment is concerned, the receiving State's failure to fulfill its obligations under Article 36 of the Vienna Convention gravely damages an alien defendant or convicted person since consular assistance has actually been a determining factor in avoiding the imposition or application of the death penalty.

In short, foreigners who confront an alien juridical system which operates, in the cases that have given rise to this request, in a language in which the interested parties are not usually fluent cannot actually enjoy the same guarantees as nationals of the receiving State without the communication with and assistance of the consular authorities of the State of which the foreigners are nationals. Consular intervention is precisely what attenuates the situation of disadvantage in which such foreigners find themselves, and this is all the more evident in crimes subject to the death penalty and in cases in which capital punishment has already been imposed.

In light of the foregoing, the Government of Mexico considers that the lack of notification, which is the reason for this request, places those concerned in a situation of inequality before the courts and even before the law, and deprives them of facilities that are legitimate and adequate in their circumstances for the preparation of their defense, and of the right to due process and to the minimum guarantees required in a regular proceeding in accordance with international law. In the view of the Government of Mexico, not only does this omission violate the Vienna Convention, but it is also incompatible with various human rights instruments whose object and purpose, as established by the Inter-American Court itself, "is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States[14]."

The Government of Mexico considers that the authorized opinion of the Inter-American Court in this matter would not only be helpful in the measures undertaken by the Government itself and by the respective defense attorneys on behalf of Mexican nationals, but it would also benefit nationals of other countries who may find themselves in a similar situation in the inter-American sphere in general, inasmuch as "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality[15]." According to information released by a group of defense lawyers, nationals of third countries may have been sentenced to death in Arizona, California, Florida, Ohio, Texas and Virginia, and for federal crimes in the United States of America, without the timely notification required by the Vienna Convention. According to the same source, five other member States of the OAS (Argentina, Canada, Honduras, Paraguay and Peru) may have nationals in the same situation in the United States of America.

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[14] *Restrictions to the Death Penalty, supra*, para. 50.

II. APPLICABLE PROVISIONS

Article 36 of the Vienna Convention "Communication and contact with nationals of the sending State" stipulates:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.[16]
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

The present request refers to situations in which both the sending State and the receiving State are Parties to the Vienna Convention, in which both are members of the OAS and signed the American Declaration of the Rights and Duties of Man, whose juridical significance has been recognized by that Court, and in which although the receiving country has not ratified the American Convention, it has ratified the United Nations International Covenant on Civil and Political Rights. The present request is limited to cases involving capital punishment because of the irreparable consequences of its application; however, no part of the present request shall be interpreted to the detriment of complying with the Vienna Convention in any other circumstances whatsoever.

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[15] American Convention on Human Rights, Preamble.

[16] Article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,to which Mexico is a signatory, contains similar provisions. Article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, adopted by the UN General Assembly through resolution 40/114 of December 13, 1985, recognizes as a human right of all aliens the freedom to communicate with the consulate or diplomatic mission of the State of which they are nationals. Also, paragraph 38.1 of the Standard Minimun Rules for the Treatment of Prisoners, adopted on August 30, 1955, establishes that: "Prisoners, who are foreign nationals, shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong".

On these premises, the authorized opinion of the illustrious Inter-American Court of Human Rights is sought on the following questions, on the basis of Article 64(1) of the American Convention and Articles 59 and 60 of the Rules of Procedure of the Court:

A. VIENNA CONVENTION ON CONSULAR RELATIONS

A reading of Article 36 of the Vienna Convention shows that this provision makes a distinction between the rights of the sending State with regard to its nationals, the obligations of the receiving State with regard to the sending State and the nationals of the sending State, and the rights of the interested person in regard to the receiving State.

In light of the above, the following specific questions about the Vienna Convention are raised:

Within the framework of Article 64(1) of the American Convention, should Article 36 of the Vienna Convention be interpreted as containing provisions concerning the protection of human rights in the American States?

From the standpoint of international law, is the enforceability of the individual rights conferred on foreigners by the above-mentioned Article 36, by the interested parties before the receiving State, subject to the protests of the State of which the interested parties are nationals?

Taking into account the object and purpose of Article 36(1)(b) of the Vienna Convention, should the expression "without delay" contained in that provision be interpreted as requiring the authorities of the receiving State to inform every foreigner detained for crimes punishable by the death penalty of the rights conferred on him by the same Article 36(1)(b), at the time of the arrest, and in any case before the detained foreigner makes any statement or confession before the police or judicial authorities?

From the standpoint of international law and in the case of aliens, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36 (1)(b) of the Vienna Convention?

B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 2, paragraphs 1 and 2, of the Covenant on Civil and Political Rights establishes the following duties of the States Parties:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 6, paragraphs 1 and 2, of the Covenant establishes:

> 1. Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life.*

> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission and *not contrary to the provisions of the present Covenant....*

Article 14 of the Covenant establishes, *inter alia:*

> 1. *All persons shall be equal before the courts and tribunals.* In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, *in full equality:*
>
> b) To have *adequate time and facilities for the preparation of his defence* and to communicate with counsel of his own choosing

The United Nations' safeguards to ensure the protection of the rights of persons sentenced to the death penalty, adopted by the Economic and Social Council on May 25, 1984, establish in paragraph 5:

> Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings[17].

Article 50 of the Covenant stipulates that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

The following specific questions are raised with regard to the Covenant:

Within the framework of Article 64(1) of the American Convention, should Articles 2, 6, 14 and 50 of the Covenant be interpreted as containing provisions concerning the protection of human rights in the American States?

Within the framework of Article 14 of the Covenant, should it be understood that Article 14 should be applied and interpreted in light of the expression "all possible safeguards to ensure a fair trial" contained in paragraph 5 of the respective United Nations safeguards, and that in the case of foreigners accused of or charged with crimes punishable by the death penalty the same expression includes immediate notification to the detainee or defendant, by the receiving State, of the rights conferred on him by Article 36(1)(b) of the Vienna Convention?

In the case of foreign persons accused of or charged with crimes punishable by the death penalty, is the receiving State's failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention compatible with their right to "adequate... facilities for the preparation of his defence", pursuant to Article 14 (3)(b) of the Covenant?

In the case of foreign persons accused of or charged with crimes punishable by the death penalty, should the term "minimum guarantees" contained in Article 14(3) of the Covenant, and the term "at least equal" contained in paragraph 5 of the corresponding United Nations safeguards be interpreted as exempting the receiving State from immediate

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[17] ECOSOC, Resolution 1984/50; General Assembly, Resolution 39/118 (emphasis added).

compliance with the provisions of Article 36(1)(b) of the Vienna Convention with respect to the detained person or defendant?

In the case of American countries constituted as federal States which are Parties to the Covenant on Civil Rights, and within the framework of Articles 2, 6, 14 and 50 of the Covenant, are those States bound to ensure the timely notification referred to in Article 36 (1)(b) of the Vienna Convention to every individual of foreign nationality who is arrested, detained or tried in its territory for crimes punishable by the death penalty; and to adopt provisions in keeping with their domestic laws to give effect in such cases to the timely notification referred to in this article in all its component parts, if the same provision is not already guaranteed by legislative or other provisions, in order to give full effect to the corresponding rights and guarantees enshrined in the Covenant?

Within the framework of the Covenant and in the case of persons of foreign nationality, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) f the Vienna Convention?

C. CHARTER OF THE OAS AND THE AMERICAN DECLARATION

Article 3(k) of the OAS Charter reaffirms as a principle of the Organization that: "The American States proclaim the fundamental rights of the human person without distinction as to race, nationality, creed or sex.

According to the Inter-American Court, the American Declaration on the Rights and Duties of Man "contains and defines those essential human rights to which the Charter refers, so that the Charter of the Organization with regard to human rights may not be applied or interpreted without incorporating its pertinent norms into the corresponding norms contained in the Declaration[18]."

In the view of the Government of Mexico, the pertinent articles in this case are Articles I (Right to life, liberty and personal security), II (Right to equality before the law), and XXVI (Right to due process of law) of the Declaration:

> Article I. Every human being has the right to life, liberty and the security of his person.
>
> Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
>
> Article XXVI. Every accused person is presumed to be innocent until proven guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

The following specific questions are asked with regard to the interpretation of the Charter and the Declaration:

In cases of arrest and detention of aliens for crimes punishable by the death penalty and in the framework of Articles 3(k) of the Charter and II of the Declaration, is the failure to notify the detainee or defendant immediately of the rights conferred on him under Article 36 (1)(b) of the Vienna Convention compatible with the Charter's proclamation of human

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[18] *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, of July 14, 1989, para. 43.

rights, without distinction of nationality, and with the Declaration's recognition of the right to equality before the law without distinction as to any factor?

In the case of aliens and in the framework of Article 3(k) the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty, when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention?

III. ADMISSIBILITY

Mexico is a member State of the OAS and a Party to the American Convention. The present request identifies the treaties and the provisions of them whose interpretation is sought, a well as the specific questions on which it (Mexico) intends to obtain the opinion of the Court, and the considerations that gave rise to the request[19], with the understanding that more details may be furnished and additional factors clarified during the corresponding hearing.

Article 64(1) of the Convention authorizes the Court to render advisory opinions on the interpretation of the Declaration, within its sphere of jurisdiction in connection with the Charter and the Convention[20], and of other treaties concerning the protection of human rights in the American States[21].

The Government of Mexico does not intend for the Court to determine the scope of international commitments undertaken by States that are not members of the OAS, nor does it intend for the Court to interpret norms for the functioning of organs and organizations outside the Inter-American system[22]. On the contrary, the present request directly concerns the protection of human rights in the Americas and its main purpose is to ensure compliance with, and to determine the scope of, the obligations acquired by member States of the OAS in accordance with international law[23].

Furthermore, the Court is not being asked to interpret any State's domestic law, nor to exercise its advisory jurisdiction "for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion[24]." As shown in the introduction to the request, the present situation is one in which non-fulfillment of international commitments may have irreparable consequences on that most fundamental of all rights of the human person: the right to life. It is also worth recalling cases of commutation of the death penalty as a result of domestic courts' applying and interpreting human rights instruments in the same manner as international protection organs[25]. Moreover, there have been cases in which the advisory proceedings before the Court have contributed in harmonizing domestic laws concerning the death penalty with the requirements of international human rights treaties, and even in suspending executions[26]. Nevertheless, the intention of the request is not for the Court to rule on the State's responsibility in any specific case.

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[19] Rules of Procedure of the Inter-American Court, Arts. 59 and 60(1).

[20] *Interpretation of the American Declaration*, *supra*, para. 48

[21] *"Other Treaties" Subject to the Advisory Jurisdiction on the Court*, Advisory Opinion OC-1/82 of September 24, 1981, Ser. A. No. 1, para. 52 ("First").

[22] Ibid. ("Second").

[23] Ibid., para. 38.

[24] *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of October 6, 1987, Ser. A, No. 9, para. 16.

[25] See, for example, Pratt and Morgan v. Attorney -General of Jamaica, 1993 Appeal No. 10 (J.P.C.), 14 H.R.L.J. 338 (1993).

[26] See *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83 of September 8, 1983, Pleadings Oral Arguments and Documents, Ser. B, No. 3, at 222 (statement of Guatemala).

It must be emphasized, therefore, that the request does not seek to impair the system of protection to the detriment of any individual, but to obtain an opinion through an advisory proceeding "designed to assist the States and organs in fulfilling and applying human rights treaties, without subjecting them to the formalities and to the system of sanctions that characterizes the contentious proceeding[27]." The Government of Mexico considers that the authorized opinion of the Court would be extremely important for the injured individuals, their defenders, the authorities of the sending and receiving States, as well as for the international protection organs and especially for the preservation of a fundamental human right. The factors set forth herein fully justify the Court's rendering the requested opinion.

IV. PETITIONS

The Government of Mexico requests the illustrious Inter-American Court:

FIRST.- To transmit a copy of this request to the States and organs referred to in Article 52(1) of the Rules of Procedure of the Court. To invite all the interested persons and entities to submit written opinions on the points that are the subject of the request, pursuant to Article 62(3) of its Rules of Procedure.

SECOND.- To convene the hearing provided for in Article 62(4) of the Rules of Procedure.

THIRD.- To declare the request admissible and render the advisory opinion in due course.

V. NAME AND ADDRESS OF THE AGENT OF THE GOVERNMENT OF MEXICO

The Government of Mexico appoints Ambassador Sergio Gonzalez-Gálvez, Assistant Secretary for Multilateral Affairs, as its Agent, and *Licenciado* Enrique Loaeza-Tovar, General Coordinator for Protection and Consular Affairs; and *Licenciado* Miguel Ángel González-Félix, Legal Adviser, who are attached to the Ministry of Foreign Affairs, as its Alternate Agents; and *Licenciados* María Isabel Garza, Jorge Cicero, and Hernán Ruiz, officials in the same Ministry, are appointed as advisers. The Government of Mexico will receive notifications at: Consultoría Jurídica, Secretaría de Relaciones Exteriores, Nonoalco 1, Edif. Nuevo, Cuerpo "B", 3er nivel, Tlatelolco, México, D.F., C.P. 06995.

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[27] *Restrictions to the Penalty, supra*, para. 43.

Annex MG 45

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF ARIZONA,
KARL LAGRAND V. STEWART
(ORDER OF 23 FEBRUARY 1999)

United States District Court

District of Arizona

Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)
Fed.R.Crim. P. 49

Date: 02/23/99

To: Carla G Ryan
Law Office of Carla G Ryan
6987 N Oracle Rd
Tucson, AZ 85704

Re: Case Number: 4:92-cv-00026 Instrument Number: 275

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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CV 92-26 Tuc JmR

KARL HINZE LaGRAND, Petitioner, vs. TERRY STEWART, et al., Respondents.	No. CIV 99-95-TUC-JMR **ORDER**

Petitioner Karl Hinze LaGrand is an Arizona prisoner under sentence of death who is scheduled to be executed at 3:00 p.m. on February 24, 1999. Petitioner has filed with the Court what he styled an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a motion for stay of execution. The Petition alleges, among other claims, that execution by lethal gas is cruel and unusual punishment. For the reasons stated herein, the Court finds that it has jurisdiction to entertain Petitioner's lethal gas claim, that the lethal gas claim is procedurally barred from review on the merits, and that the Court lacks jurisdiction to consider the remaining claims.

BACKGROUND

On December 14, 1984, Petitioner and his brother, Walter LaGrand, were sentenced to death for a murder committed in the course of a failed bank robbery. On direct appeal, the Arizona Supreme Court affirmed. See State v. LaGrand (Karl), 152 Ariz. 483, 733 P.2d 1066 (1987); State v. LaGrand (Walter), 153 Ariz. 21, 734 P.2d 563 (1987). Thereafter, the trial court denied relief on Petitioner's first post-conviction petition under Rule 32 of the Arizona Rules of Criminal Procedure, and the Arizona Supreme Court denied review.

Petitioner then sought relief in federal court. In March 1993, Petitioner filed an Amended Petition for Writ of Habeas Corpus which asserted, among other claims, that execution by lethal gas violated the Eighth Amendment. See LaGrand v. Lewis, No. CV-92-26-TUC-JMR, Memorandum of Law in Support of Petitioner's Writ of Habeas Corpus at 119 (file doc. 70). The Court found the lethal gas claim procedurally defaulted because Petitioner had failed to raise the claim in state court and no longer had an available state remedy. Following briefing on cause and prejudice, the Court barred the claim from consideration on the merits. See LaGrand v. Lewis, No. CV-92-26-TUC-JMR (Order filed Jan. 25, 1995). The Court ultimately denied habeas relief. See LaGrand v. Lewis, 883 F.Supp. 469 (D.Ariz. 1995), and LaGrand v. Lewis, 883 F.Supp. 451 (D.Ariz. 1995).

On appeal, the Ninth Circuit concluded that Petitioner's lethal gas challenge was not ripe for adjudication because he would be executed by lethal gas only if he affirmatively chose that option. See LaGrand v. Stewart, 133 F.3d 1253, 1264 (9th Cir.), cert. denied, 119 S. Ct. 422 (1998). The court affirmed in all other respects. See id. Following denial of certiorari by the United States Supreme Court, the Arizona Supreme Court issued a warrant of execution, setting the date for February 24, 1999.

On February 4, 1999, Petitioner selected lethal gas as his method of execution. See Respondents' Anticipatory Pleading in Opposition to Successive Petition for Writ of Habeas Corpus, at Attachment. Thereafter, Petitioner filed his second state Rule 32 petition, raising numerous grounds for relief, including a challenge to lethal gas. The Superior Court of Pima County dismissed the petition, and on February 23, 1999, the Arizona Supreme Court denied review. Petitioner then filed the present petition and application for stay in this Court.

DISCUSSION

I. Applicability of the AEDPA

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which placed new limitations on claims sought to be raised in a second or successive petition. Title 28, section 2244(b) of the United States Code, as amended by the AEDPA, provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

> that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Pursuant to the Supreme Court's decision in Lindh v. Murphy, 117 S. Ct. 2059 (1997), the amendments to § 2244(b) apply to habeas petitions filed after the AEDPA's enactment.

Petitioner does not specifically address applicability of the AEDPA. Instead, he simply attempts to amend the original habeas proceeding (Civil No. 92-26-TUC-JMR). This he may not do. The Court entered final judgment denying relief on Petitioner's first habeas petition on March 30, 1995. The Ninth Circuit Court of Appeals subsequently affirmed. LaGrand v. Stewart, 133 F.3d 1253, 1264 (9th Cir.), cert. denied, 119 S. Ct. 422 (1998). Accordingly, Petitioner's present "Amended Petition" must be construed as a second habeas petition. See, e.g., Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) (holding that a Rule 60(b) motion must be treated as a successive petition governed by the AEDPA).

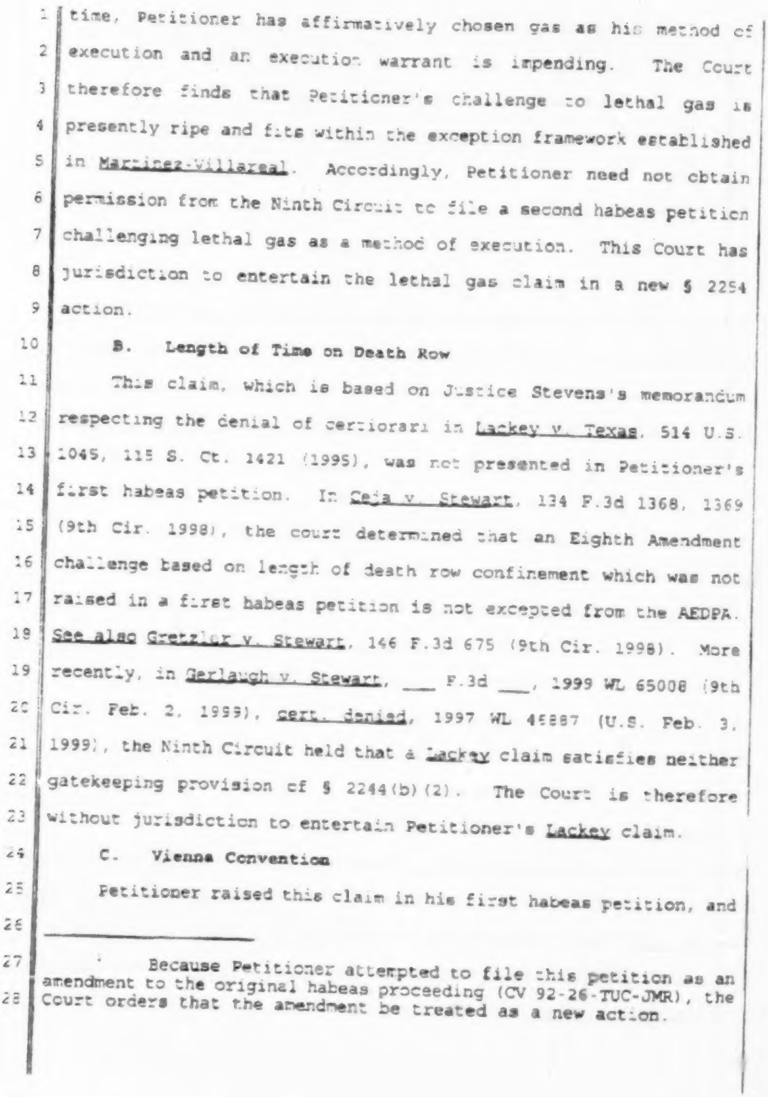
Having determined that Petitioner's amended petition must be treated as a second petition, the Court next addresses whether any of Petitioner's claims fall outside the AEDPA's gatekeeping provisions for second or successive petitions. See, e.g., Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998) (recognizing exception to AEDPA for second petition raising competency to be executed claim). If not, then this Court lacks jurisdiction and Petitioner must first seek authorization from the Ninth Circuit

Court of Appeals before the Court may consider the claims in a successive petition. See 28 U.S.C. § 2244(b)(3)(A).

A. Lethal Gas as Method of Execution

In Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998), the Supreme Court recognized an exception to the AEDPA's gatekeeping requirement for a claim that could not have been adjudicated in the petitioner's first habeas corpus petition. In that case, the petitioner sought federal review of a second habeas application which raised a competency to be executed claim under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986). The claim had been raised in the petitioner's initial petition but was dismissed without prejudice as premature. See Martinez-Villareal v. Stewart, 118 F.3d 628, 630 (9th Cir. 1997), affirmed, 118 S. Ct. 1618 (1998) ("[T]he determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state.") (citing Herrera v. Collins, 506 U.S. 390, 406, 113 S. Ct. 853, 863 (1993)). In upholding the Ninth Circuit's conclusion that Martinez-Villareal's Ford claim fell outside the gatekeeping provisions of § 2244(b), the Supreme Court stated, "There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." Martinez-Villareal, 113 S. Ct. at 1621.

As in Martinez-Villareal, Petitioner here raised his lethal gas claim in his first petition, but it was found premature. See LaGrand, 133 F.3d at 1264 ("[Petitioners] would be executed by lethal gas only if they affirmatively choose to do so."); see also Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997). Since that



time, Petitioner has affirmatively chosen gas as his method of execution and an execution warrant is impending. The Court therefore finds that Petitioner's challenge to lethal gas is presently ripe and fits within the exception framework established in *Martinez-Villareal*. Accordingly, Petitioner need not obtain permission from the Ninth Circuit to file a second habeas petition challenging lethal gas as a method of execution. This Court has jurisdiction to entertain the lethal gas claim in a new § 2254 action.

B. Length of Time on Death Row

This claim, which is based on Justice Stevens's memorandum respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421 (1995), was not presented in Petitioner's first habeas petition. In *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998), the court determined that an Eighth Amendment challenge based on length of death row confinement which was not raised in a first habeas petition is not excepted from the AEDPA. *See also Gretzler v. Stewart*, 146 F.3d 675 (9th Cir. 1998). More recently, in *Gerlaugh v. Stewart*, ___ F.3d ___, 1999 WL 65008 (9th Cir. Feb. 2, 1999), *cert. denied*, 1997 WL 45887 (U.S. Feb. 3, 1999), the Ninth Circuit held that a *Lackey* claim satisfies neither gatekeeping provision of § 2244(b)(2). The Court is therefore without jurisdiction to entertain Petitioner's *Lackey* claim.

C. Vienna Convention

Petitioner raised this claim in his first habeas petition, and

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Because Petitioner attempted to file this petition as an amendment to the original habeas proceeding (CV 92-26-TUC-JMR), the Court orders that the amendment be treated as a new action.

the Court found it procedurally defaulted. The Ninth Circuit affirmed. *LaGrand*, 133 F.3d at 1261-62. Petitioner is now precluded under 28 U.S.C. § 2244(b)(1) from re-raising the claim in a successive petition. Furthermore, the claim does not satisfy either of the gatekeeping provisions of § 2244(b)(2). *See* *Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998) (Vienna Convention claim failed to satisfy § 2244(b)(2) exceptions). The Court lacks jurisdiction over this claim.

D. Pecuniary Gain Aggravating Factor
E. Heinous, Cruel or Depraved Aggravating Factor

Both of these claims were presented and denied in Petitioner's first habeas petition. *See* 28 U.S.C. § 2244(b)(1). To the extent Petitioner asserts there is new law or facts to support his position, the Court finds that the claims do not satisfy § 2244(b)(2)'s gatekeeping provision. Therefore, the Court lacks jurisdiction to consider the merits of these claims absent authorization from the Ninth Circuit. *See* 28 U.S.C. § 2244(b)(3).

F. Prior Conviction Aggravating Factor

This claim was not raised in Petitioner's first habeas petition. However, Petitioner does not assert that the claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Nor does the claim satisfy the second gatekeeping provision because it is not related to guilt or innocence. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Accordingly, absent authorization from the Ninth Circuit, the Court lacks jurisdiction to decide this claim.

G. Juror Bias

Petitioner's claim that a juror was improperly excused for bias was raised and rejected in Petitioner's first habeas petition. Accordingly, the Court does not have jurisdiction to consider this claim. *See* 28 U.S.C. § 2244(b)(1).

H. Newly Discovered Evidence of Actual Innocence

In this claim, Petitioner asserts that both his conviction and sentence are undermined by newly discovered evidence: two of the investigating detectives assigned to interrogate Petitioner recently stated their belief that Petitioner did not intend to kill and that he had acted under a "panic reaction." For the sentencing aspect of this claim, the Court lacks jurisdiction because it is unrelated to guilt or innocence. *See* 28 U.S.C. § 2244(b)(2)(B). With respect to the conviction, even assuming the alleged facts could not have been discovered previously through the exercise of due diligence, Petitioner has failed to allege any constitutional error as required by the actual innocence gateway of § 2244(b)(2)(B). *See* *Villafuerte*, 142 F.3d at 1126-27 (denying permission to file successive petition where petitioner did not show constitutional error from failure to present "newly discovered" evidence).

I. Clemency Proceedings

Pursuant to the Ninth Circuit's decision in *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400, 402-03 (9th Cir. 1997), an action under 42 U.S.C. § 1983 is the proper vehicle for litigating this claim. Because Petitioner raised the claim in a § 2254 habeas petition, the Court may not grant relief on the basis of this claim.

J. Lethal Injection

This claim was raised in Petitioner's first habeas petition and therefore must be dismissed. See 28 U.S.C. § 2244(b)(1).

K. Competency to be Executed

In Martinez-Villareal v. Stewart, the Ninth Circuit held that, to preserve a competency claim for review outside of the AEDPA's successive petition restrictions, the claim must be raised in a first petition and dismissed as premature. 118 F.3d at 634. Petitioner here did not raise this claim in his first habeas petition. Even assuming this claim falls outside applicability of the AEDPA, Petitioner has utterly failed to assert a legal or factual basis for the claim, stating only that it is included in the petition "to preserve it for later consideration." In addition, Petitioner has yet to present this claim in state court. See A.R.S. § 13-4022.

II. Eighth Amendment Challenge to Lethal Gas

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. See Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989). On comity and federalism grounds, federal courts will not review a petitioner's claim which was denied relief by the state courts based on a state law ground independent of federal law and adequate to support the judgment. See Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977). When a petitioner is procedurally barred by state procedure from raising a federal claim in state court, a federal court may not consider the merits of the claim unless the petitioner demonstrates legitimate cause for the default and actual prejudice, or shows that a fundamental miscarriage of justice would result. Coleman, 501 U.S. at 750, 111 S. Ct. at 2565.

In his most recent state post-conviction petition, Petitioner included a challenge to the constitutionality of lethal gas as a method of execution.[2] The state superior court ruled that the claim was moot because Petitioner had a choice of lethal injection. The court further found in the alternative that the claim was precluded under A.R.S. § 13-4232(A)(3), which provides: "A defendant is precluded from relief under this article based on any ground . . . [t]hat was waived at trial, on appeal or in any previous collateral proceeding."

In his petition, Petitioner fails to address Respondents' contention, raised in their anticipatory pleadings, that Petitioner's lethal gas claim is procedurally barred from review on the merits in federal court. Nor does Petitioner advance any arguments with regard to cause and prejudice for the alleged default. Nonetheless, because the Court determines that Petitioner's lethal gas claim is procedurally defaulted, the Court will set forth in some detail the basis for its conclusion.

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[2] Petitioner did not raise his lethal gas challenge at sentencing, on direct appeal, or in his first petition for state post-conviction relief. The claim was presented for the first time in his 1993 federal habeas petition. At that time, the Court determined that Petitioner had no remaining state remedies for the claim and therefore the claim was "technically" exhausted. See Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1.

The state superior court's preclusion ruling rests on an independent and adequate state procedural ground. As a result, the Court may not consider the claim on the merits absent a showing of cause and prejudice, or a fundamental miscarriage of justice.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that 'some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 2566 (1991). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). "Prejudice" is actual harm resulting from the alleged constitutional error. Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984).

In his first habeas petition, Petitioner argued futility as cause for the default, asserting that Arizona's death penalty statute had been found constitutional by both the Arizona and United States Supreme Courts. See LaGrand v. Lewis, No. CV-92-26-TUC-JMR, Memorandum Regarding Cause & Prejudice for Procedural Default on Issue of Lethal Gas (file doc. 158). Petitioner also alleged that the factual basis of the claim did not arise until the April 1992 lethal gas execution of Arizona inmate Donald Harding, the first such execution following reinstatement of the death penalty in Arizona, and the subsequent change in Arizona law adopting lethal injection as the default method of execution. *See* A.R.S. § 13-704. These arguments are unpersuasive.

Futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573 (1982). *See also* *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir. 1993) (stating that futility argument is not viable). Significantly, the constitutionality of lethal gas was far from settled at the time of Petitioner's sentencing in 1984. Indeed, only one federal circuit had addressed the claim. *See* *Gray v. Lucas*, 710 F.2d 1048, 1060 (5th Cir. 1983) ("[N]either the Supreme Court nor any federal court has addressed the issue whether the gas chamber constitutes cruel and unusual punishment."). *Cf.* *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987) (raising challenge to lethal gas in same time period as Petitioner LaGrand's sentencing and appeal).

Likewise, the factual basis of Petitioner's claim was reasonably available at the time he was sentenced. In *Gray v. Lucas*, a 1983 decision, the petitioner submitted eyewitness affidavits and scientific data attesting to the alleged painful nature of execution by lethal gas. 710 F.2d at 1058-60. The *Gray* court also noted that several states were switching from gas to lethal injection. *Id.* at 1060-61. Clearly, Petitioner could have discovered and presented a factual predicate for his lethal gas claim when he was sentenced in 1984.

Finally, the Court observes that the Ninth Circuit's ripeness determination does not provide cause for Petitioner's default. In his second petition for post-conviction relief, Petitioner argued that the state court should not find the claim precluded because it was not ripe until the execution date was set and he elected gas, citing the Ninth Circuit's decision in his case. However, the ripeness doctrine is solely an issue of federal court subject matter jurisdiction. *See Poland v. Stewart*, 117 F.3d 1094, 1104 ("An appellate court has a duty to consider sua sponte whether an issue is ripe for review."). Federal ripeness is irrelevant to whether Petitioner properly exhausted his claim pursuant to Arizona law. Indeed, in declining to review the petitioner's lethal gas claim in *Poland*, the Ninth Circuit specifically stated: "We need not decide whether this claim is valid, or even whether a claim is presented at all." 117 F.3d at 1104. Moreover, at the time Petitioner was sentenced, lethal gas was the only available method of execution. It was not until eight years later that Petitioner was presented with a choice in his method of execution.[3] During this time, Petitioner had a legal and factual basis to challenge lethal gas. Accordingly, Petitioner is unable to show cause for failing to present this claim to the Arizona courts in a procedurally proper manner.[4]

If a petitioner cannot meet the cause and prejudice standard, the Court still may hear the merits of a procedurally barred claim if the failure to hear the claim would constitute a "fundamental miscarriage of justice." Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514 (1992). The "fundamental miscarriage of justice" exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: (1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336, 112 S. Ct. at 2517. In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). Petitioner is unable to demonstrate that either "miscarriage of justice" claim is applicable here.

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[3] Arizona adopted lethal injection as its default method in 1992. *See* A.R.S. § 13-704.

[4] Because Petitioner cannot establish cause for the default of his lethal gas claim, the Court declines to discuss prejudice. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

CONCLUSION

All of Petitioner's claims except the challenge to lethal gas are subject to the restrictions imposed by 28 U.S.C. § 2244(b) and therefore the Court lacks jurisdiction absent authorization from the Ninth Circuit Court of Appeals. The Court has jurisdiction to entertain the lethal gas claim and Petitioner need not seek permission from the Ninth Circuit to file a successive petition on this basis. Nevertheless, Petitioner's lethal gas claim was not properly presented to the state's highest court and Petitioner has failed to establish cause and prejudice for the default, or that a fundamental miscarriage of justice will result if the claim is not decided on the merits. Accordingly, Petitioner's lethal gas claim is procedurally barred.

THEREFORE, IT IS HEREBY ORDERED:

(1) that the Clerk of the Court shall **STRIKE** Petitioner's Amended Petition for Writ of Habeas Corpus, Memorandum of Law in Support of the Amended Petition for Writ of Habeas and Motion for Stay of Execution, and exhibits thereto from Civil No. 92-26-TUC-JMR and **TRANSFER** the documents to a new action (Civil No. 99-95-TUC-JMR);

(2) that the Clerk of the Court shall **STRIKE** Respondents' Anticipatory Pleading in Opposition to Successive Petition for Writ of Habeas Corpus (file doc. 270) and Supplement to Anticipatory Pleading from Civil No. 92-26-TUC-JMR and **TRANSFER** the documents to Civil No. 99-95-TUC-JMR.

(2) that the prior grant of leave to proceed In Forma Pauperis shall continue to be in force in the new action;

(3) that Petitioner's Petition for Writ of Habeas Corpus by Person in State Custody (28 U.S.C. § 2254) is **DENIED** as to his challenge to lethal gas and that judgment shall be entered accordingly;

(4) that Petitioner's Petition for Writ of Habeas Corpus by Person in State Custody (28 U.S.C. § 2254) is **DISMISSED** for lack of jurisdiction as to the remaining claims;

(5) that Petitioner's Application for Stay of Execution is **DENIED**;

(6) that the Clerk of the Court shall make immediate telephonic notification of this Order to all counsel of record; and

(7) that the Clerk of the Court shall forward this Order by facsimile to all counsel of record, the Clerk of the United States Supreme Court, the Clerk of the United States Court of Appeals for the Ninth Circuit, and the Clerk of the Arizona Supreme Court.

DATED this 23rd day of February, 1999.

John M. Roll

JOHN M. ROLL
United States District Judge

Annex MG 46

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER'S WRIT OF *HABEAS CORPUS* BY A PERSON IN STATE CUSTODY, *LAGRAND V. LEWIS*

(8 MARCH 1993)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,

Petitioner,

vs.

SAMUEL LEWIS, Director,
Arizona Department of
Corrections,

Respondent,

GRANT WOODS, Attorney General
of the State of Arizona

Additional Respondent.

NO: CIV 92-026 TUC JMR

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER'S WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C. § 2254)

The Petitioner, Karl Hinze LaGrand, through counsel, hereby submits this Memorandum of Points and Authorities to be considered with the Petition for Habeas Corpus that was filed in this matter.

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/ / /

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RESPECTFULLY SUBMITTED this 8th day of March, 1993.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR TABLE OF AUTHORITIES TO TO MEMORANDUM FILED ON MARCH 8, 1993

The Petitioner hereby requests this Court to accept the attached Table of Authorities which should have been filed with the Memorandum to the Petition for Habeas Corpus that was filed on March 8, 1993.

RESPECTFULLY SUBMITTED this ____ day of March, 1993.

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By_______________________
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is not a simple case of a bank robbery that was badly bungled. It is the story of young boy, so emotionally abused and unloved, that he lashed out in an impulsive, uncontrollable rage,[1] possibly triggered by alcohol and drugs; however, the story does not end there. Even though the bank manager and the bank teller were unfortunate victims, the Petitioner has also now become a victim -- a victim of the system.

Upon being arrested, the Petitioner could not afford to retain counsel to represent him and to be his advocate. The Public Defender's Office in Pima County had a conflict; therefore, the Petitioner was assigned a court-appointed lawyer -- Tom Higgins. The record is unclear why, but after the majority of motions were prepared and filed, Higgins attempted to withdraw and then agreed to stay on the case but to let David Gerson assume the primary representation of the Petitioner.[2] Gerson was a inexperienced trial lawyer who had never handled a capital case prior to assuming responsibility of this "high profile" case. The morning of trial, the Petitioner requested that Gerson be removed. Simultaneously, Gerson requested to withdraw. Both requests were denied by the trial court.

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[1] It has now been discovered that this was not the first time that Karl had totally "lost control". On at least three other occasions this same type of uncontrollable, impulsive behavior was demonstrated.

[2] From this point, Higgins had no part in the representation of Karl LaGrand, not even as an advisor or consultant.

Eighteen witnesses were called -- only two of the eighteen were even asked a question by Gerson and they were merely perfunctory questions. A review of the record amply demonstrated that the Petitioner did not have an advocate on his behalf during his trial.

An ineffective claim was raised in the direct appeal and in the post-conviction process; however, no additional testimony was presented to establish that counsel's performance was below the accepted standard in Pima County, nor was expert testimony presented to substantiate the claim of ineffective assistance because the trial court refused to hold an evidentiary hearing. Thus, to date, there has been no evidence presented to show that the performance of trial counsel was below the standard acceptable in a capital case in Pima County at the time that this matter went to trial.

Petitioner was less that three months past his eighteenth birthday at the time of the crime. At the time of the trial, he was barely twenty. This was a capital case. The publicity and community pressure were extremely high and the community was demanding the death penalty. The Petitioner never had a full and fair hearing with an advocate to represent him at the guilt phase or at the penalty phase. Likewise, he has never had a full and fair hearing on the question of competency of counsel at the trial level and at the appellate level.

Upon investigating this case in order to prepare for this Petition for Habeas Corpus, undersigned counsel have located several witnesses[3], as well as court documents and school records which provide numerous factors that should have been presented at the aggravation/mitigation hearing in this matter. Trial counsel did not reasonably investigate the case, nor did he seek out these records and present them to the trial court in an effort to save the Petitioner's life.

As indicated above, no court has ever held an evidentiary hearing on these claims of ineffectiveness. The Ninth Circuit Court of Appeals recently held in Hendricks v. Vasquez, No. 91-16631 (1992) U.S.A. pp. Lexis 20516 (9th Cir., 9-2-92), that the petitioner in that case had a right to an evidentiary hearing when there had never been one before. Hendricks' claims of ineffective assistance of counsel at the guilt and penalty phases centered on his trial counsel's failure to investigate Hendricks' background in order to present a mental impairment defense. The court held that, without an evidentiary hearing, it could not determine whether counsel's failure to call any defense witnesses during the guilt phase constituted deficient performance. As for the penalty phase, the District Court rejected Hendricks' claim by relying in its assertion that the facts of Hendricks' childhood were undisputed and that any testimony that Hendricks' family members could have given concerning Hendricks' childhood would have been cumulative. The Ninth Circuit, however, held that since one of the prosecution's principle strategies at trial was to establish that Hendricks was probably lying about his dramatic childhood, and since defense counsel presented no direct evidence to establish those facts, such evidence may have been useful and not cumulative. Therefore, the court held that without an evidentiary hearing, it could not determine whether counsel's performance had a probable effect on the outcome of the penalty phase.

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[3] Several of which could have been reasonably located at the time of trial.

In the present case, the Petitioner has raised similar issues as in Hendricks; and, as in Hendricks, has never received an evidentiary hearing. The prosecutions strategy with Dawn Lopez's testimony was to show the premeditated nature of the Petitioner's acts, and to negate an impaired mental state. Therefore, as in Hendricks, an evidentiary hearing is required.

In addition, the Seventh Circuit Court of Appeals has opined that a trial counsel's failure to conduct a reasonable investigation to discover readily available evidence regarding the Petitioner's I.Q., susceptibility to influence of friends, and disadvantaged background, constituted ineffective assistance of counsel and requires the vacation of a death sentence and a remand for a new penalty trial. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991).

It is therefore respectfully requested that this Court not only consider the cumulative effect of all of the allegations of ineffectiveness, as well as the claims of other errors, but also to grant an evidentiary hearing so that the Court will have the benefit of all of the evidence before it in considering granting relief.

II. FACTS.

Shortly before 8:00 a.m. on the morning of January 7, 1982, Ronald M. Shunk, Jr. arrived at work in Marana, Arizona for the purpose of opening the El Taco fast food restaurant which he managed. T. 2/7/84, pp. 732-737. The restaurant was located immediately adjacent to a local Valley National Bank. Id.

As Mr. Shunk drove through the parking lot which was common to both businesses, he noticed several vehicles in the immediate area. Id. As he got out of his car, another car, a four-door, white Plymouth with a brown top drove in. Id. 742-743. The occupants, half-brothers Walter and Karl LaGrand, T. 2/15/84, p. 35, pulled up, and the driver, Walter, rolled down his window and asked the time the restaurant opened. T. 2/7/84, p. 739. Mr. Shunk responded that it opened at 9:00 a.m. Id. pp. 739-740. Walter then asked what the current time was and Mr. Shunk responded that it was ten minutes of eight. Id.

At about 8:00 a.m. Valley National Bank teller Dawn Lopez arrived for work. Id. p. 827. As she pulled into the parking lot she noticed three vehicles in the lot, a motor home, an unidentified vehicle, and the pickup truck of Mr. Kenneth Hartsock, the Valley National Bank branch manager. Id. pp. 827-828. Ms. Lopez drove into the parking lot and then, realizing that she was early to work, left for a brief drive through Marana. Id. pp. 827-830. In part she left the parking lot because she thought that the manager, Mr. Hartsock, might be inside the bank conducting some personal business before the other employees arrived. Id. p. 830.

She drove around the Marana area for about three or four minutes and then returned to the bank. Id. p. 830. Upon her return, she saw Karl LaGrand and Mr. Hartsock standing outside the bank's main doors. Id. p. 831. She noticed that a white car with a brown top was also parked in the lot. Id. By this time, Karl LaGrand and Mr. Hartsock were inside the bank. As Ms. Lopez got up to the sidewalk which runs parallel to the bank entrance, Walter LaGrand got out of the car and asked what time the bank opened. Id. pp. 832-834. Ms. Lopez replied that it opened at 10:00 a.m. Id.

Ms. Lopez walked up the steps to the bank entrance and opened the door, which she noticed was unlocked. Id. p. 835. When she walked inside, she noticed that Mr. Hartsock was standing at the vault next to Karl LaGrand. Id. p. 835. Karl was dressed in a coat and tie Id. p. 837, and he had a briefcase. See T. 2/15/84, p. 106. Karl told her to come inside and "sit down", pointing to a nearby chair. Id. p. 837. Karl opened his jacket and exposed the butt of a gun,[4] which was struck inside his pants. Id. p. 838. He also had an earpiece in his ear, Id. p. 852, which was connected to a police radio scanner. T. 2/15/84, pp. 1113-1114.

As Ms. Lopez moved to sit down, Walter LaGrand entered the bank. Id. p. 840. Karl ordered Mr. Hartsock to open the bank vault. Id. p. 841. After a few minutes of frustration regarding their unsuccessful efforts to persuade Mr. Hartsock, the pair remarked that if Mr. Hartsock would not open the vault then, he and Ms. Lopez would be shot. Id. p. 842. Mr. Hartsock replied that he could not open the vault alone. Mr. Hartsock and Ms. Lopez were then moved into the manager's office. Id. p. 844. The office was arranged with a desk, a credenza, an office chair and several customer chairs. Id. p. 845. Mr. Hartsock and Ms.Lopez were ordered to sit in the customer chairs and to face the wall. Id. p. 846. At this point, the brothers used black electrical tape to bind the victims' hands behind their backs. Id. p. 846. Walter then threatened Mr. Hartsock, indicating that if he did not tell how to open the vault he would be killed. Id. p. 848. While this threat was made, Walter held a letter opener from Mr. Hartsock's desk to the victim's throat. Id. pp. 848-849. In response, Mr. Hartsock truthfully indicated that he could not open the safe by himself; however, he lied when he said a security guard would soon be arriving to open the safe. Id. p. 848. At this point, a bandanna was stuffed into the mouth of each victim. Id. p. 849.

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[4] The gun was a toy pistol that Karl obtained from Zody's Department Store. [*See*, Exhibit A from Hearing of June 27, 1983, p. 4 of Karl's first confession, *See*, also T. 2/16/84, pp. 1213-1219].

The telephone located on Mr. Hartsock's credenza began to ring. Id. p. 852. The caller was Wilma Rogers, a fellow bank employee. Id. p. 852. Ms. Rogers had arrived at the bank at about 10 minutes after 8:00 a.m. Id. p. 775. As she entered the parking lot, she noticed two unfamiliar vehicles in the parking lot, and she became nervous. Id. pp. 777-778. One of the vehicles was Karl's and Walter's white and brown car. Although the security signal[3] in the bank window indicated that everything was normal, Ms. Rogers had "some sort of feeling" that all was not well. Id. p. 780. As a result, she noted the license plate numbers of the unknown cars on the edge of a grocery bag she found in her car. Id. p. 781; See, also Exhibit 50. She noted that the license plate number of the white and brown vehicle was TXK-749. Id. p. 783.

After recording the license plate numbers of the unfamiliar vehicles, Ms. Rogers went around the corner to a local grocery, the K&M Market. Id. p. 783. At this location, she asked to use the store's telephone and she called to the bank. Id. p. 784. Ms. Rogers answered the telephone. Id. p. 784. During a brief conversation, Ms. Rogers asked to speak with Mr. Hartsock and Ms. Lopez replied that he was not there. Id. p. 785. This struck Ms. Rogers as odd since she had previously noted that Mr. Hartsock's tan pickup truck was also parked in the bank parking lot. Id. p. 785. Continuing her conversation, Ms. Rogers advised Ms. Lopez that her car headlights were still on, as indeed they were. Id. p. 786. Ms. Rogers advised that if Ms. Lopez would go out and turn off her headlights then she, Ms. Rogers, would feel comfortable entering the bank. Id. p. 786. The conversation then ended. The telephone conversation with Ms. Lopez worried Ms. Rogers and she began to suspect that something was wrong at the bank. After waiting a short while, she asked the son of the store's owner, Ken Botkin, to call again to the bank. Id. p. 787. Mr. Botkin did so and asked for Mr. Hartsock. He was told that Mr. Hartsock was not there. Id. p. 788. At this point, Ms. Rogers called the Marana Town Marshall's Office. Id. p. 788.

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[3] The bank used "signals" to indicate to employees whether the bank building was secure. For example, each morning, after the building had been completely checked out by the first employee entering the premises, the blinds in the front window were lowered and a plastic bank card advertisement was placed in the window. [T. 2/7/84, p. 780].

While Ms.Lopez was talking to Ms. Rogers, Karl LaGrand had been listening in on the conversation. Id. pp. 851-852. After hanging up the phone, Ms. Lopez reported that if she did not go out and turn off her headlights than Ms. Rogers would call the sheriff. Id. p. 855.

At this point, the brothers removed the tape from Ms. Lopez' hands and one of them escorted her to the bank door. Id. pp. 857-859. Before being permitted to go outside, she was told that if she tried to get away, Mr. Hartsock would be shot. Id. p. 857.

Ms. Lopez went to her car, unlocked it, turned off her lights, and then returned to the bank. Id. pp. 857-859. As she re-entered she was escorted back to the manager's office, where her hands were re-taped. Id. p. 860. At this point, Karl and Walter began to become agitated. They were extremely nervous. Id. p. 907. Ms. Lopez was ordered to sit in a chair and face the wall. Id. p. 862. After a brief period, as she sat facing the wall, she "heard some struggling". Id. p. 862. Thinking that the robbers might be hurting Mr. Hartsock, she stood up and broke the tape off of her hands. Id. p. 863. She turned toward Mr. Hartsock and, for an instant, saw Mr. Hartsock struggling with the two men.[6] Id. p. 863. She saw Mr. Hartsock was facing the window and Walter was in front of him. Id. p. 863. Karl was in back of Mr. Hartsock, holding him by his shoulders. Id. p. 863. She could not tell what the robbers were doing. Id. pp. 863-864. All of this took place in just a few seconds. Id. p. 864.

She recalled that almost immediately thereafter Walter came after her. Id. p. 864.[7] She raised her hands to protect herself and she was repeatedly stabbed. Id. p. 865. She fell to the ground and lay on her right side against the north wall of the room. Id. p. 865. In great pain, she could only recall seeing the "scuffling of feet and movements". Then, she saw Mr. Hartsock lying on the floor on his stomach. Id. p. 866. She heard someone repeat twice, "just make sure he's dead". Id. pp. 866-867. The pair then fled, and Ms. Lopez immediately got up and locked the bank doors. Id. p. 869.

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[6] Walter LaGrand denied participating in the stabbing. T. 2/15/84, pp. 66-69. Walter also called eye witness expert Geoffrey Loftus, who offered a plausible response on this point. In his testimony, Dr. Loftus identified certain variables with regard to the events of January 7, 1982 which could have adversely affected Ms. Lopez's memory of these events. T. 2/16/84, Testimony of Dr. Loftus, passim. Among others, he identified "extreme stress" and a witnesses' "expectations" as factors. Id. The record indicated that Ms. Lopez was under extreme stress and it suggests that since before the stabbing, she once saw Walter hold a letter opener to Mr. Hartsock's throat, T. 2/7/84, p. 905, she anticipated seeing a similar incident when she heard the struggling and turned to help Mr. Hartsock. T. 2/8/84, p. 290, lines 16-25 through p. 921, lines 1-24.

[7] See footnote 6, infra.

Walter stated that immediately after the stabbing Karl was "shaking and crying". He ordered Karl to lay down in the back seat of their car. On the ride back to Tucson, Karl was breathing very heavily and his nose was bleeding. He was "still in shock". RT Vol. 9 p. 9, 1105.

Meanwhile, Ms. Rogers again called the bank. Id. p. 805. Ms. Lopez answered the phone and screamed for help. Id. p. 806. Ms. Rogers immediately called for assistance. Id. p. 806. Law enforcement and medical personnel soon arrived. T. 2/8/84, p. 955. The first person on the scene was medical technician Anna Garrison. Id. She looked through the bank's glass doors and saw Mr. Hartsock's legs sticking out past the door to the managers' office. Id. p. 955. Ms. Lopez was found sitting nearby on the floor with a phone in her hand. She was all covered with blood. Id. p. 956.

Mr. Hartsock was lying face-down the floor, his hands tied behind his back with electrical tape. Id. p. 956. His pulse was checked and none was found. Id. p. 957. An autopsy subsequently revealed that Mr. Hartsock had sustained 24 stab wounds to his upper torso and neck. T. 2/9/84, p. 1045. Any of the four wounds to Mr. Hartsock's heart would have been fatal. Id. p. 1046. The majority of the wounds that Mr. Hartsock sustained were stabs wounds made by a sharp object. Id. p. 1046. The majority of the wounds were consistent with those which could be made with a steak knife, T. 2/9/84, p. 1051; or a letter opener.* T. 2/9/84, p. 1050;

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* There was testimony at trial that some of the wounds could have been made with a steak knife or serrated edged instrument and others by a straight edged instrument

T. 2/7/84, pp. 791-792.

Dawn Lopez remained conscious and was immediately taken to the University of Arizona Hospital in Tucson. T. 2/7/84, p. 874. She suffered from multiple stab wounds to her neck, arm and torso. Id. pp. 875-876.

The crime scene was secured by police. T. 2/7/84, 1984, pp. 762-770. A number of photographs were taken of the interior of the bank manager's office and certain physical evidence was seized. The physical evidence included a bloody bandanna, a steak knife, and the sheath to Mr. Hartsock's desk letter opener. Id. pp. 764-767.

The officers at the crime scene also immediately began an investigation to locate the suspects. The license plate numbers obtained from Ms. Rogers were checked through the Department of Public Safety and the name and address of the owner of the white and brown vehicle was obtained.[*] T. 2/8/84, pp. 963.

This lead was followed and at approximately 3:00 p.m. on January 7, a white and brown Plymouth was located at an apartment in Tucson. Id. p. 964. F.B.I. and D.P.S. agents set up surveillance on the car. Id. p. 964. After a brief time, three individuals, two men and a woman, were seen leaving an apartment and entering the suspect vehicle. Id. p. 965. The car was followed out of the parking lot and soon stopped. Id. p. 965-966.

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such as a letter opener.

[*] The car was owned by the father of Walter LaGrand's girlfriend, Karen Libby. T. 2/8/84, pp. 971.

The men in the car were Karl and Walter LaGrand. Id. pp. 965-968. The female passenger was Karen Libby. The men were arrested and the car was searched. A Realistic brand police scanner was found underneath the seat of the car. Id. pp. 969-970.

The apartment from which the brothers were seen leaving was rented by Karen Libby. Id. pp. 971-972. That apartment was subsequently searched and a steak knife similar to the one found in the bank was seized. Id.

Walter and Karl LaGrand were taken to the Department Public Safety headquarters in Tucson, Arizona where they were detained and questioned. That evening and early the next morning, Karl LaGrand, while under a great deal of stress, gave two separate confessions to Deputy Sheriff Barkman, one at the D.P.S. headquarters, T. 7/5/83, pp. 42-49, after Deputy Barkman slapped Karl on his face because Karl was becoming hysterical, and one at St. Mary's Hospital where Karl was taken because he was hyper-ventilating. T. 7/5/83, pp. 49-57; T. 6/28/83, pp. 6-9, 16, 19-20. In these statements, Karl said that he alone stabbed Mr. Hartsock and Ms. Lopez and that Walter LaGrand was not in the room during these events. T. 2/16/84, pp. 1213-1219. Karl indicated that he stabbed Mr. Hartsock because Mr. Hartsock kicked him in the leg[10] when Karl was alone in the room with the victims and that in a panic, he, Karl, picked up a letter opener from Mr. Hartsock's desk and stabbed first Mr. Hartsock and then Ms. Lopez. Id.[11]

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[10] At trial, on cross examination, Ms. Lopez acknowledged that just before the stabbing one of the brothers made a move toward her and that Mr. Hartsock kicked the leg of the man making this move. T. 2/8/84, pp. 933-936. She also acknowledged that the stabbing occurred immediately after this incident. The precipitating kick was corroborated by the report of the emergency room physician who treated Karl at St. Mary's Hospital. He was taken there because of his mental state the night of his arrest.

Karl's statements differ from Ms. Lopez' account. Using Dr. Loftus' testimony regarding extreme stress, these inconsistencies can be explained. For example, Dr. Loftus testified that an individual's memory can be adversely affected when that individual is under "extreme stress". The record is clear that Karl was under extreme stress, to the point of being hysterical during the crime, after the crime and during his interrogation at Department of Public Safety headquarters and when he was transferred to St. Mary's Hospital.

On February 15, 1982, Donald Stone was walking with his wife through a residential desert area in Tucson, Arizona when he observed a youth, Carlos Tejeda, drop a briefcase which he had been carrying. T. 2/9/84, pp. 984-989; 990-991. Carlos had found the briefcase while walking through a neighborhood wash[12] after leaving his baby sitters house and heading for home. Id. p. 984. Carlos dropped the briefcase when he became concerned that it might belong to Mr. Stone. Id. p. 988. Mr. Stone retrieved the suitcase and the following day took it to a lock and key shop to have it opened. Id. pp. 991-993. When he looked at the contents, he noticed that the briefcase contained a toy pistol, a bandanna, some black tape and a letter opener. Id. p. 993.

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[11] At trial Walter LaGrand testified on his own behalf. He said that after the phone call from Ken Botkin, the pair decided to leave. T. 2/15/84, pp. 64-69 (morning session). The stabbing occurred when, he said, he was out in the bank's parking lot, where he had gone to start the getaway car. Id. When he got to the car, he could not find the car keys and so he returned to the bank and the manager's office. Id. When he returned, he found his brother crying and shaking, "I killed him. I didn't mean to do it. I panicked. He kicked me." Id. p. 68. Walter LaGrand attempted to introduce Karl's two confessions into evidence, but his request was denied. T. 2/16/84, pp. 1211-1219.

[12] Walter LaGrand testified that he threw the briefcase and its contents into the wash on the day of the attempted robbery. T. 2/15/84 (afternoon session), p. 1106.

A few days later, Mr. Stone and an officer from the Pima County Sheriff's Department met. Id. pp. 993-994. The briefcase was turned over to the deputy who inventoried its contents. Id. pp. 997-998. It contained a chrome colored toy pistol with a black plastic grip, some crumpled pieces of electrical tape, a red bandanna, a radio ear jack, Mr. Hartsock's letter opener, Ms. Lopez's key ring and Karl's dark brown sports jacket and black clip-on tie. Id. p. 999.

III. PROCEDURAL HISTORY.

Karl and Walter LaGrand were arrested on January 7, 1982. On January 14, 1982 an Indictment was issued charging the Petitioner with six counts: First Degree Murder, Attempted Murder, Armed Robbery, Aggravated Robbery, and two counts of Kidnapping. The arrest and indictments arose out the robbery of a Valley National Bank in Marana, Arizona.

Tom Higgins was appointed to represent Karl LaGrand on January 14, 1982. On May 25, 1983, the Petitioner moved to suppress his confessions made immediately after his arrest. On June 13, 1983, David Gerson, the Petitioner's second appointed attorney, was appointed to represent him.[13] The Court granted the motion to suppress on September 19, 1983.

On September 23, 1983, the Petitioner, through Gerson, made a motion, pursuant to Rule 11 of the Arizona Rules of Criminal Procedure, for the appointment of an expert to examine the Petitioner's mental state. That Motion was withdrawn on January 30, 1984, the day before the trial.

The Petitioner's trial began on January 31, 1984. He was found guilty on all counts by the jury on February 17, 1984, and was sentenced to death on December 14, 1984.

The Petitioner immediately appealed his case on automatic appeal to the Arizona Supreme Court with a newly appointed attorney representing him. Both brothers' cases were affirmed by the Court in State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066 (1987), and State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). See exhibits to Habeas Petition. The United States Supreme Court denied certiorari.

A Petition for Post Conviction Review was filed on behalf of the Petitioner on December 11, 1987, and was denied on September 27, 1990, without an evidentiary hearing being granted. A Petition for Writ of Certiorari was filed in the United States Supreme Court and was denied on September 13, 1991.

Petitioner filed his Preliminary Writ of Habeas Corpus on

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[13] Although Tom Higgins's Motion to Withdraw was denied, and the Court appointed Gerson as an "associate counsel". Higgins played no more role in Karl LaGrand's defense. Not even as an advisor or consulate.

January 16, 1992.

IV. LEGAL ISSUES

A. Ineffective Assistance of Counsel

1. Ineffective assistance of counsel at trial

A criminal defendant has a constitutional right to competent counsel. Whether counsel is retained or appointed does not make a difference -- all counsel are judged by the same standard. Cuyler v. Sullivan, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716 (1980); United States Constitution, amendment six.[14] That does not mean that a defendant is entitled to an error-free trial, Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); however, if counsel's conduct at trial, viewed in the context of the totality of circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, a criminal conviction obtained through such a trial unconstitutionally deprives the defendant of his liberty. Id., Cuyler v. Sullivan, supra, 446 U.S. at 344; McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

In Arizona, it is well established that the test for ineffectiveness of counsel is that a defendant must prove that counsel's representation was not reasonable under all of the circumstances, i.e., that it was deficient, and that counsel's deficient performance prejudiced the defendant. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, 1068 (1987); State v. Rossi, 146

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[14] Amendment Six is applicable to the states through Amendment 14 of the United States Constitution.

Ariz. 359, 364, 706 P.2d 371, 376 (1985).

Arizona's test for ineffectiveness is modeled after the United States Supreme Court's test fashioned in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). See e.g., State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

Strickland defines the minimal competence level required by counsel. Proof of deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment." Strickland, 466 U.S. at 686. The question that needs to be answered is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

The Strickland court went on to specify that where "there is a reasonable probability that, but for counsel's unprofessional errors", the "result would have been more favorable to the defendant there will be prejudice". Id. at 694-95 (emphasis added).

This standard set forth in Strickland is lower than the preponderance of the evidence standard. Id.; Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989). "Reasonable probability is a probability sufficient to undermine confidence in the outcome". Strickland at 694.

The sixth amendment guarantee of right to counsel exists "in order to protect the fundamental right to a fair trial". Id., 104 S.Ct. at 2063. A fair trial is defined as "one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding". A fair trial is meant to insure that the "result is reliable". Id.; State v. Carriger, 143 Ariz 142, 692 P.2d 991 (1984), cert. den., 105 S.Ct. 2347 (1985). Therefore, the focus when a defendant raises a competency of counsel claim is not whether counsel erred, but whether the defendant had a fair trial. See also, State v. Gerlaugh, 144 Ariz. 449, 456, 698 P.2d 694, 701 (1985).

The defendant must prove both prongs of the Strickland test: that counsel's representation was not reasonable under all the circumstances and that the defendant was prejudiced by counsel's conduct. State v. LaGrand, supra; State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985); see also, State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985).

Attached as Exhibit J to the Petition for Habeas Corpus, the Petitioner has identified numerous separate and distinct examples of incompetency of his trial lawyer during the pre-trial and trial stages. Those allegations include the failure to maintain a relationship with the Petitioner, failure to interview witnesses, failure to develop defenses, failure to investigate the Petitioner's state of mind at the time of the offense, as well as at the time of the confession, and at the time of trial and at the time of sentencing, failure to hire and utilize experts, failure to file necessary motions, and a failure to be an advocate for the Petitioner rather than a "neutral observer".

In State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (App. 1986), the

Arizona Court of Appeals found that counsel was deficient in not objecting properly during expert witness testimony coupled with the fact that counsel didn't interview witnesses until the first day of trial.

In the present case, counsel merely relied on interviews that others had done rather than to interview witnesses, lay and expert, himself. Additionally, he not only didn't object to questionable witness testimony, counsel basically did not participate at all -- not even to the extent of questioning of the witnesses, let alone making proper objections.

In State v. Edwards, III, 139 Ariz. 217, 677 P.2d 1325 (App. 1983), the Arizona Court of Appeals held that when an insanity defense is presented that "special care" is necessary and failing to personally confer with a doctor was ineffective. In the present case, insanity was listed as a defense by Karl LaGrand's lawyer; however, it was never properly developed. Likewise, counsel totally failed to investigate, develop or even to raise the defenses of impulsivity and/or temporary insanity. See, State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

In State v. Bush, 148 Ariz. 325, 714 P.2d 818 (1986) ineffective assistance of counsel was found where there was a mishandling of crucial testimony as to the entry point of the bullet; lack of interviewing witnesses for trial; failure to interview medical experts until the day the medical expert was to testify; and counsel's failure to listen to a tape of a witness which he had access to for over one year.

In the present case, it is obvious that counsel for both defendants were surprised when the pathologist testified that the stab wounds could have been caused by two different types of instruments, i.e., a serrated-edged steak knife and a straight-edged letter opener. See Petition for Post-Conviction Relief filed by Walter Lagrand, Exhibit F, attached to Habeas Petition. Therefore, there was not just a "mishandling" of this crucial evidence, there was a total lack of handling of this crucial evidence. This was like having a "bomb" fall in the middle of trial before the jury.

Again, Karl Lagrand's attorney admitted that he relied on interviews of witnesses that others, prior attorneys, or the co-defendant's attorney, had performed. He did not have his own investigator. He also failed to properly prepare or educate his mental health expert. He failed to provide his mental health expert with all of the necessary documents so that the mental health expert could make informed judgments utilizing all of the information available.

The record also reflects that Karl LaGrand's attorney failed to have a clear understanding of his own case. This is demonstrated by his complete reversal from originally requesting Karl LaGrand's confessions be suppressed and then changing his mind and requesting the trial court to reverse the suppression order just prior to preceding to trial. This complete change of strategy at the last moment further supports the lack of pre-trial investigation and preparation which is essential in any case and even more so in a capital case.

Counsel further failed to assure that the Petitioner was tried before an impartial jury, No objections to the manner of the selection of potential jurors, not to the pay received were ever made. The failure to do so resulted in a class of individual, self-employed, or individuals who exists on "tips" or work for small companies, from sitting on this jury.

The Arizona Supreme Court has held that counsel may be ineffective on a motion for new trial if counsel failed in his required duty to use the skill, thoroughness and preparation reasonably necessary to provide effective assistance of counsel. This can be established by a failure to investigate and present necessary evidence. State v. Fisher, 152 Ariz. 116, 730 P.2d 825 (1986).

In the present case, counsel did not use the skill, thoroughness and preparation necessary to provide effective assistance at trial, sentencing or on the motion for new trial. The Arizona Supreme Court even said in its opinion:

> Although trial counsel here kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial.
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> . . . .
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> Counsel could have presented the appellant's case more fully and skillfully. Nonetheless, the test for counsel's ineffectiveness is not whether a better job could have been done, but whether his performance fell below the minimum threshold of professional skill established by case law. We hold that counsel's

> representation of appellant was not ineffective.

State v. LaGrand, id. 152 Ariz. 486.

Because counsel failed to investigate and present evidence which would have established the defense of impulsivity, the Petitioner was prevented from presenting his defense and thereby prejudiced. Present counsel have investigated and are prepared to present evidence which supports this defense. Dr. Timothy Derning, after reviewing hundreds of pages of documents, reviewing interviews and spending over 10 hours with the Petitioner, has uncovered several incidents which support a major character flaw in the Petitioner which makes him "freak out" and act impulsively without any intent or without control over his behavior.[15] Even though trial counsel alluded to this type of defense during his closing arguments, it was never investigated or prepared so that it could be effectively presented to the jury.

This case went to the jury on both kinds of murder -- felony murder and premeditation. Evidence was presented on both. The record does not reveal what theory the jury found the Petitioner guilty under. Therefore, this was a viable defense that was not presented and could have affected the outcome of the trial.

Even though Arizona adheres to the M'Naghten test for insanity, the defense may introduce evidence of the defendant's impulsive nature to prove that the defendant is incapable of premeditation. State v. Christensen, 129 Ariz. 32, 35, 628 P.2d 580, 583 (1981). In Christensen, the defendant did not deny killing his ex-wife, but he wanted to introduce psychiatric testimony to the effect that the defendant had difficulty dealing with stress and that in stressful situations his actions were more reflexive than reflective. Id. at 34. The defense argued that this testimony was admissible under Arizona Rules of Evidence 404(a)(1). Id. The trial court rejected the defendant's testimony, believing that it would raise the defense of diminished responsibility that the Arizona Supreme Court has rejected in State v. Schantz, 98 Ariz. 200, 206, 403 P.2d 521, 525 (196), cert. den., 382 U.S. 1015 (1966).

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[15] In the transcripts of the interrogation by Weaver Barkman, Karl states, "I wasn't me, goddamit it." Throughout the interrogation and at other times, Karl states clearly, "I didn't mean to do it." It is following this description that Karl says, "I wasn't me."

The Arizona Supreme Court reasoned that preventing a defendant from offering evidence to dispute any of the elements of a charge against him is "inconsistent with fundamental justice" and held that the trial court erred in refusing the psychiatric testimony because "the establishment of the character trait of acting without reflection tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide." Id. at 35-36. However, an expert witness may not testify concerning whether the defendant acted impulsively at the time of the killing. Id. at 35-36.

The Arizona Supreme Court reaffirmed this limitation in State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). In Hallman, the defendant claimed that the trial court erred in granting the

State's motion in limine prior to the commencement of trial to preclude any expert testimony regarding whether the defendant was acting reflectively or reflexively during the alleged criminal offense. Id. at 35. The court explained that "such testimony may only be used as evidence that the defendant possesses such a trait and it must be left to the jury to determine whether and how the trait affected the defendant's specific intent at the time of the alleged crime." Id. (citing State v. Hicks, 133 Ariz. 64, 71, 649 P.2d 267, 274 (1982); State v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980) (internal citations omitted). The court found that the trial court had correctly limited the scope of the experts' testimony in order to comply with State v. Dickey and State v. Christensen and prevented "inadmissible evidence from being suggested to the jury." Id.; see also State v. Arnett, 158 Ariz. 15, 22, 760 P.2d 1064, 1071 (1988) (holding that the trial court's exclusion of proffered psychiatric testimony was proper where the proposed testimony did not show a character trait of impulsivity, but rather showed the defendant's probable state of mind at the time the offense occurred); State v. Rivera, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987) (affirming trial court's exclusion of expert testimony dealing only with the defendant's probable state of mind at the time of the offense instead of testimony as to a general personality trait of the defendant).

Additionally, prejudice occurred because trial counsel failed to zealously represent his client. He was not an advocate for Karl LaGrand. The jury could only have been lift with the impression that David Gerson was merely a "neutral observer": his conduct undermined the proper functioning of the adversarial process. This is demonstrated by the affidavits attached as Exhibits B, C, D, E, F, G, H, I, J, to this Memorandum.

The Eleventh Circuit has held, based on the record of the trial alone, that it was plain that the trial attorney did not accord the defendant even a "modicum of professional assistance at any time" and therefore was ineffective. Young v. Zant, supra 677 at 794-95. In that case, the attorney was unaware of the fact that guilt and penalty were decided in separate proceedings and he conceded guilt.

As stated earlier, even the Arizona Supreme Court held that Mr. Gerson was not an aggressive advocate for Karl LaGrand. Karl LaGrand never received an independent professional to represent him in a zealous fashion. As indicated by Mr. Burke's affidavit, Exhibit D, he was not concerned with Karl's case, he was representing his own client, Walter LaGrand; therefore, Karl was not constitutionally represented by counsel during his capital trial and even if Walter LaGrand was, that doses not cure the prejudice felt by Karl LaGrand.

Under Strickland, counsel must conduct a reasonable investigation or make a reasonable decision not to investigate.[14] In Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987), the court found that when a record reflects that an attorney did not spend "much time" on a capital case, i.e., no legal research, no interviews, no development of defenses, no competency hearing (when there has been a history of mental problems), that an evidentiary hearing is necessary and if there was not one provided at the state level, it should be done in the Federal District Court because there is enough on the record to establish ineffective assistance.

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[14] The ABA Standards for Appointment of Counsel and NLADA Standards also set forth what needs to be done in a capital case. [See Exhibit K and L].

In the present case, a review of the request for payment of attorney fees establishes how little work was done on behalf of the Petitioner by his trial counsel. The fee vouchers speak for themselves. See Exhibit M. Likewise, a review of the record demonstrates the lack of work that was completed in this case. It also discloses a lack of any kind of true adversarial representation. Eighteen witnesses were called during the guilt phase in the particular case and defense counsel for Karl LaGrand only asked two witnesses perfunctory questions. Counsel, even though being present, acted as a "neutral observer", rather than an advocate for Karl LaGrand. In order to be effective, it is imperative that the attorney representing a defendant act in such a way that the adversarial process in not undermined. Strickland, supra Even Mr. Gerson acknowledges that he would have done things much differently if appointed on this case today. His inexperience, late appointment and lack of special training prevented him from giving Karl LaGrand effective assistance of counsel in this capital murder case.

Finally, the system that is used in Pima County violates a defendant's constitutional right under the fifth, sixth and fourteenth amendments to the United States Constitution, as well as Article II, §§ 4 and 24 of the Arizona Constitution, and the Arizona Rules of Professional Responsibility, Rules of the Arizona Supreme Court, 17a A.R.S.

In Pima County, there are no standards set forth for appointment of counsel and there are no assurances effective counsel will be appointed, that even though the State Supreme Court has indicated that in capital cases they expect vigorous representation, there has been no standard set forth to assure that vigorous representation, i.e., competent representation, occurs in these cases. See, State v. LaGrand, supra, 733 P.2d at 1069. See also, ABA Standards, Exhibit K, and NLADA Standards, Exhibit L.

2. Ineffective assistanc of counsel at sentencing

There was literally no aggravation/mitigation hearing presented on behalf of Karl LaGrand. The court was not thoroughly informed about the family dysfunctional history, the Petitioner's mental health history and his inability to properly deal under extreme stress, his abused childhood and his character flaw which results in his acting in an uncontrollable impulsive manner when under extreme stress.

Ineffective assistance of counsel has been found when counsel refused to present any evidence or otherwise participate at a sentencing. State v. Carriger, supra, 143 at 148, 692 P.2d at 997 (1984).

In State v. Perkins, 141 Ariz. 278, 686 P.2d 1248, 1265 (1984), at sentencing, the defendant was not represented by his trial counsel, but by substitute counsel, who indicated to the court that he was not familiar enough with the case to make a statement. The Arizona Supreme Court concluded that this was a denial of effective assistance of counsel. The court held that counsel's role was no more significant than that of a neutral observer. Id. There was no attempt to present any mitigating evidence. Id. Thus, there was no competent representation at sentencing. Id.

In another similar situation, State v. Cruz, 137 Ariz. 541, 672 P.2d 470 (1983), the Arizona Supreme Court found ineffective assistance as a result of non-participation of defense counsel when he became convinced that the trial judge was prejudiced against his client. See also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); State v. Gerlaugh, supra; ABA Standards (Exhibit K).

In the present case, Petitioner's trial counsel failed to meet with Petitioner in advance of his meeting with the pre-sentence investigator making his report and failed to provide any relevant documentation to the pre-sentence investigator or to the court. Additionally, Petitioner's counsel failed to interview and present potential family members, medical experts, prior probation officers, foster families, and other witnesses who could have provided the court with information regarding the Petitioner's background, state of mind, and other mitigation. See Affidavits, Exhibit B - J.

In Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), the District Court held that counsel was ineffective because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiencies, abject childhood and history of drug and alcohol abuse. The District Court found, however, that there was no prejudice because the same sentence, even if this evidence had been presented, would have resulted. On review, the Court of Appeals for the Eleventh Circuit held that counsel must conduct a reasonable investigation or make a reasonable decision not to investigate. They relied on Strickland v. Washington, supra. In order to establish prejudice, one must demonstrate "a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced". Id.

In the present case, the Affidavits prepared by Mr. Langlois, the Barstows, and Dr. Timothy Derning and Richard Bozich all support what a competent lawyer would have found. (Exhibits G, H, I, J).

In Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), trial counsel failed to present at sentencing any evidence of mental problems even though he thought his client had some. He presented a defense that his client had psychiatric problems, but he did nothing to bolster that defense. See also, Evans v. Lewis, supra, (defendant hospitalized for mental problems in the past). The court held that it was ineffective for counsel to fail to investigate and present mitigating evidence when he was aware or at least thought his client may have mental problems.

The court in Deutscher, supra, stated:

> Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The constitution prohibits imposition of a death penalty without adequate consideration of facts which might evoke mercy.

See, California v. Brown, 497 U.S. 538, 554, 107 S.Ct. 837, 846 (1987).

In the present case, the record, when reviewed, puts one on notice of a long history of mental and emotional problems. The records from Y.O.U. and Vision Quest (Exhibit N), indicate most strikingly a series of prior mental health evaluations.

"Consideration of such evidence is a constitutionally indispensable part of the process of inflicting the punishment of death." Id. (Quoting Woodson v. North Carolina, 428 U.S. 286, 304, 96 S.Ct. 2978, 2991 (1976) (plurality).

In the present case, if defense counsel had provided all of the relevant information to his mental health expert, an opinion as espoused by Dr. Timothy Derning, See Exhibit I, would have been available. Any mental health expert is limited by the lack of information, lack of time to interview the client and by a lack of education about the client, his background and his family.

A review of the Petitioner's juvenile records would automatically put one on notice of mental problems. During closing argument and at the mitigation hearing, the Petitioner's attorney alluded or flirted with these problems; however, he failed to adequately investigate and present them to the court so that they could be considered substantial enough to outweigh the aggravating factors presented by the State.

3. Ineffective Assistance of counsel on appeal

The law is clear that a defendant has a constitutional right to the effective assistance of counsel on his direct appeal in state court. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The inquiry that the court must make regarding whether counsel was effective on the direct appeal is similar to the inquiry that must be made when reviewing whether counsel was effective at the time of trial: (1) the court must consider the appellate counsel's performance and whether it fell below an objective standard of reasonableness; and (2) it must review whether there is a reasonable probability that the outcome of the proceedings would have different had effective assistance been provided on appeal. *Strickland v. Washington*, *supra*, 466 U.S. at 688, 694 (1984).

To be effective, appellate counsel must raise meritorious claims and brief the issues in a clear and convincing manner. It is the primary function of appellate counsel to review the trial record and bring legal errors to the attention of the tribunal. Counsel is not required to raise all potential issues; effective advocacy may include strategic decisions to omit weak claims of error when stronger claims exist. The omission of potentially meritorious issues must, however, be a matter of strategy, not a product of ignorance of fundamental constitutional law. *See*, *Kimmelman v. Morrison*, 477, U.S. 365, 385 (1986).

In the present case several of the issues set forth in this Petition for Habeas and in the post-conviction were never raised on the direct appeal. Additionally, appellate counsel failed to competently attack and argue the appropriateness of the death penalty in this case. The appeal was especially weak regarding the lack of effective assistance at trial and pre-trial and weak in the fact that both trial counsel and appellate counsel failed to investigate and develop appropriate, relevant mitigating evidence that a reasonable investigation would have brought forth.

4. Procedural ineffective assistance of counsel, or, in the alternative, the manner in which this case was handled was a reflection of incompetent counsel per se.

The Eleventh Circuit has examined as least one case where it found that based on the record of the trial alone, it was plain that the trial attorney did not accord the defendant even a "modicum of professional assistance at any time". Young v. Zant, 677 F.2d 792, 794-95 (11th Cir. 1982). In that case, the attorney was unaware of the fact that guilt and penalty were decided at separate proceedings and he conceded guilt.

In the present case, the manner in which the trial and appellate counsel proceeded deprived the Petitioner of effective assistance of counsel just as in Young. Id.

The record reflects a total lack of investigation and interviews of potential witnesses prior to not only a Rule 11 hearing (which was withdrawn), but also prior to trial and prior to sentencing. Motions that should have been filed were not filed, were not researched, developed nor presented to the trial court. There was a blatant failure to provide the proper materials to the psychiatric experts so that they could make a proper determination of not only the Petitioner's competence to proceed to trial, but to evaluate his sanity or his capability of forming the intent necessary to be held responsible for this crime. See Dr. Timothy J. Derning's Affidavit attached as Exhibit I. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

In Elledge, the sole issue at sentencing was the defendant's mental deficiency. The District Court held that trial counsel was ineffective because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiency, abject childhood and history of drug and alcohol abuse.

In that case, the reviewing court found that that was ineffective, but there was no prejudice because there was no proof that the psychiatrist who testified on post-conviction would have been available or anyone else would have been available at the time of the trial. In our case, the experts that were available were never provided with adequate information, nor the time to spend with the Petitioner in order to make determinations that were necessary in order to inform the court and the jury of potential mental impairment as mitigation at the penalty phase. Dr. Derning, in his Affidavit, Exhibit I, indicates that with a proper review of all of the materials that were now provided, which were available at the time of trial, and with adequate time, ten hours, to visit with the Petitioner, a thorough, clinical evaluation as is necessary in this type of case, can be done and the conclusions would have been drastically different than the ones formed by the mental health experts that were utilized in 1984.

Under Strickland counsel must conduct a reasonable investigation or make a reasonable decision not to investigate. In the present case, there clearly were reasons to investigate and to present mitigating evidence on behalf of the Petitioner.

In Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987), the court found that when a record reflects that an attorney did not spend "much time" on a capital case, i.e., no legal research, no interviews, no development of defenses, no competency hearing (when there has been a history of mental problems), that an evidentiary hearing is necessary and if there was not one provided at the state level it should be done at in Federal District Court because there is enough on the record to establish ineffective assistance.

Therefore there was ineffective assistance per se in this case. Even the Arizona Supreme Court held that this was a very borderline- finding effective assistance only because there was a co-defendant who the Court held was effective; however, the co-defendant's counsel was not concerned with zealously representing the Petitioner, in fact he was shifting the responsibility to the Petitioner.

B. Pre-Trial Issues

1. The state court committed constitutional error when it excused for cause a prospective juror with scruples against capital punishment.

During the selection of the jury the prosecutor successfully challenged for cause venirewoman Eloise Atwater, who in responding to voir dire questions expressed conscientious scruples against capital punishment. Ms. Atwater's exclusion from the jury panel over Petitioner's objection violated his constitutional right to an impartial jury selected from a pool of prospective jurors each of whom is qualified despite their hesitations concerning the death penalty. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980). By excluding a juror who is Witherspoon-Adams qualified, the State violated Petitioner's rights to due process. The violation occurred when the State breached its constitutional obligation to refrain from seeking Ms. Atwater's excusal for cause simply because of her opposition to capital punishment, absent proof that her views on capital punishment would have "prevented or substantially impaired" the performance of her duties as a trier of fact. Adams v. Texas, 448 U.S. at 45.

The constitutional rights at issue are founded on the sixth and fourteenth amendments. In a line of cases beginning with Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court has held that in a capital case a prospective juror cannot be culled from the jury panel based simply upon that individual's expressed personal aversion to execution as a form of punishment. Nor under this line of authority is it sufficient, as the record with respect to Ms. Atwater admittedly establishes, that the prospective juror's deliberations on issues of fact would be "affected" by the imposition of a death sentence upon conviction. Adams v. Texas, supra. Rather, in order to withstand constitutional challenge a prospective juror's excusal for cause based upon her aversion to the death penalty must be predicated upon a showing that the excluded venirewoman's belief rendered her incapable of honestly affirming to follow the law or to obey her duty to be impartial. Id. With regard to Ms. Atwater, the State's successful motion for excusal is not fairly supported by the whole record.

Ms. Atwater was called as a prospective juror on the last day of a four-day jury selection process. T. 2/3/84, pp. 522-558, 571-581. She was 1 of 10 individuals called to the jury box to the questioned, first as a group by the trial court and then individually by the attorneys. When she and the other veniremen were asked by the court to speak up if they felt that they were incapable of following the law as given to them by the court, she and others made no response. T. Id. p. 537. Significantly, this "silent" affirmation of the juror's oath was later reaffirmed by her in response to a series of questions asked by Petitioner's counsel:

> Mr. Burke: . . . I'd like to talk to you a bit about why you're here and why we're asking these questions.
>
> You understand that you have a civic duty to appear in these proceedings?
>
> Ms. Atwater: Right.
>
> Mr. Burke: And you, I gather, take that very seriously?
>
> Ms. Atwater: Right.
>
> Mr. Burke: You believe that you have a duty to serve as a juror?
> Ms. Atwater: Yes.
>
> Mr. Burke: And the Judge has already advised you, as I think the prosecutor advised you, that your function is not to deal with the question of punishment?
>
> Ms. Atwater: Right.

> Mr. Burke: You understand that?
>
> Ms. Atwater: (no audible response)
>
> Mr. Burke: Do you believe you have a role as a citizen in determining questions of guilt or innocence of people who are accused of crimes?
>
> Ms. Atwater: I hope so.
>
> Mr. Burke: Okay. And you believe you could follow the laws that the Judge might instruct you on in deciding this case?
>
> Ms. Atwater: I would try.
>
> Mr. Burke: And you would try, would you not, to do your job as a citizen and evaluate the evidence fairly and honestly?
>
> Ms. Atwater: Yes.
>
> Mr. Burke: And make every good faith effort you could to follow the instructions of the Court?
>
> Ms. Atwater: Yes, sir.
>
> Mr. Burke: I have no more questions, Your Honor.
>
> T. Id. pp. 578-579.

Earlier, during a general question from the trial court as to whether there was "anything not yet discussed that might influence you," that Ms. Atwater first expressed her aversion to capital punishment. T. Id. p. 572 (emphasis added). Her response prompted the following brief exchange with the prosecutor:

> Mr. Alfred: Do you think that this belief opposing capital punishment that you have, this feeling would perhaps maybe influence you a little bit as a juror?
>
> Ms. Atwater: It could.
>
> Mr. Alfred: What I'm saying is even--maybe even if you felt that the evidence showed that the defendants were guilty of first-degree murder, would you be maybe somewhat hesitant to vote guilty because you knew that

> there was a possibility of the death penalty?
>
> Ms. Atwater: Yes.
>
> Mr. Alfred: Ok. Thank you. That's all the questions I have.

T. *Id.* pp. 577-578 (emphasis supplied).

As the above quote establishes, it is at this point that the prosecutor ended his inquiry, and it is on the basis of the above answers that the prosecutor's for-cause motion was granted, over Petitioner's objection. T. *Id.* pp. 580-81.[17]

Petitioner maintains that on the entirety of this record venirewoman Atwater was stricken for cause simply because of her beliefs. She testified that as a juror she "would try" to evaluate the evidence "fairly and honestly" and "make every good faith effort" to follow the instructions of the court. Importantly, Ms. Atwater at no time stated that her scruples would substantially hinder her deliberations in applying the law to the facts. At best, the evidence in support of the trial court's finding is that her deliberations on the facts would perhaps maybe be influenced "a *little* bit" in that she would be "*somewhat* hesitant" to vote guilty because the death penalty *might* thereafter be imposed. This evidence in its totality supports no more than a finding that the possibility of Petitioner's execution would "affect" Atwater's considerations, though without sufficiently adverse impact on her ability to follow the law so as to disqualify her. Indeed, Ms.

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[17] The questions propounded by the prosecutor to Ms. Atwater were vague and tentative, and in marked contrast to the type of question the prosecutor had earlier indicated was appropriate. *See* T. 1/30/84, pp. 8-10.

Atwater by her testimony has demonstrated that she belongs to a "distinctive" group protected from excusal without cause by the fair-cross-section requirement of the Sixth Amendment: She is among those *Witherspoon-Adams* eligible members of the community who are willing to serve as jurors out of a sense of civic responsibility. *See*, *Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986). In such circumstances the State's successful for-cause challenge unconstitutionally and unfairly restricts the cross section of the community (reflected the final jury panel in which each parties' preemptory strikes are made[14]) from which the Petitioner's petit jury was selected.

It is on virtually identical voir dire testimony of prospective jurors that the United States Supreme Court has previously found constitutional violations which merit reversal. In *Adams v. Texas* the Court found violations of the Sixth and Fourteenth Amendments when jurors were excluded for no more reason than that they were unable or unwilling to avow that a mandatory penalty of death or life imprisonment would not affect their deliberations on any issue of fact. Similarly, in *Maxwell v. Bishop*, 398 U.S. 262 (1980), the Court found constitutional violations requiring a remedy when a juror was successfully challenged for cause solely on the basis of the following exchange:

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[14] In this case, following Arizona practice, from a final panel of 34 prospective jurors, the State was granted 10 jury strikes and the Defendants five strikes each, in order to obtain a 12-person petit jury, with two alternates. T. 1/31/84, p. 2; 2/3/84, pp. 700-701. *See also* Rule 18.5, Arizona Rules of Criminal Procedure.

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might present you from returning such a verdict?
>
> "A. I think I do." (Emphasis supplied.)
>
> 398 U.S. at 264.

Just as the state of the records in Adams and Maxwell were insufficient to sustain a for-cause challenge, so too is the record here.

The remedy for these constitutional violations is a new trial. The issue here is controlled by Gray v. Mississippi, 481 U.S. 648 (1987), which rejects the harmless error analysis for the improper exclusion of a juror under Witherspoon and its progeny. The per-se reversal rule adopted in Gray applies because the exclusion of Ms. Atwater from the jury panel on the sole basis that she has scruples against the death penalty was a breach of the Witherspoon-Adams limitation on the State's authority to use for-cause challenges.

The argument made here is distinguishable from the holding in Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988), wherein the Court rejected the contention that under Arizona's jury trial scheme in a capital murder case the removal for cause of a prospective juror with scruples against the death penalty did not violate the Petitioner's impartial jury rights. Here the Petitioner contends that the for-cause challenge unconstitutionally infringed upon his right to have reassurance and confidence in the fairness of the criminal judicial system which tries him for a capital offense.

This assurance is founded, in part, upon a constitutional right to select from a venire composed of a fair cross section of the community, including those with scruples against capital punishment.

Since these due process rights were violated, Petitioner is entitled to a new trial.

2. Petitioner was Denied a Fair Trial Due to Extensive and Prejudicial Pretrial Publicity

Prior to trial, both before and after jury selection, Petitioner requested that the trial court change the venue of his trial to a county other than Pima County. This request was made as a result of the extensive and prejudicial pretrial publicity this case had received since it was first charged. The Petitioner's requests for a venue change were denied, and as a result Petitioner's rights to due process and a fair trial were violated when he was convicted by a jury selected from among the citizens exposed to this pretrial publicity.

The publicity consisted of frequent front-page newspaper headlines and articles, which appeared on almost a daily basis in the weeks following Petitioner's arrest and around the time of trial, as well as T.V. and radio features. See, Exhibit P for 1/31/84, 2/1/84, 2/2/84 and 2/3/84. The publicity was highly unfavorable to Petitioner and his co-defendant. It revealed his past criminal history, described the crime in detail, and presented a sympathetic portrait of the victims.

Controversies over the response time of the Marana Marshall's Office and the co-defendant's release from jail the day before the crime also kept the story in the public eye. Related stories reported the formation of citizens' anti-crime/court-watch groups and the dedication of a memorial park to one of the victims. Even worse, the publicity revealed extrajudicial facts prejudicial to Petitioner's and the co-defendant's defense. For example, on January 9, 1982, a headline in the *Arizona Daily Star* reported "Suspect Walter LaGrand Freed One Day Before Killing, "Exhibit P, and on January 28, 1982, readers of the *Tucson Citizen* learned that "Karl LaGrand Petitioner's co-defendant Admitted Role in Killing." Exhibit P. The facts that Petitioner and Karl were being tried for and convicted of robbery in a related case, that both had prior criminal records, and that each had bond set at $1 million were also revealed. *E.g.*, Exhibit P.

Indeed, on the very day jury selection began copies of the *Arizona Daily Star* containing an article on the case were being read by prospective jurors in the jury assembly room. The article asserted that Karl's lawyer believed his own client was guilty and expected him to be convicted of murder. Exhibit P; T., 2/1/84, at pp. 175-191.

Out of an original panel of 34, *29* prospective jurors (over 85%) indicated that they had some prior knowledge of the crime. T. 1/31/84, at p. 44. Despite the excusal of 14 prospective jurors for cause due to pretrial publicity and the exhaustion of Defendants' peremptory challenges, no fewer than *seven* petit jurors were empaneled who had read the articles or had otherwise gained extrajudicial knowledge of the facts. T., 2/1/84, at pp. 124-137, 193, 220; 2/2/84, at pp. 473-496, 503-507; 2/3/84, at pp. 560-571. Petitioner's motions for a change of venue and for a continuance because of prejudicial pretrial publicity were denied. The above circumstances combined to deprive Petitioner of his right to a fair trial by an impartial jury.

The sixth amendment right to a fair trial and the due process clause of the fourteenth amendment guarantee to criminal defendants in state courts the right to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Extensive and unfavorable pretrial publicity may create such widespread bias in the community that, to ensure such an impartial jury, a change of venue is constitutionally required. *Id.*; *Rideau v. Louisiana*, 373 U.S. 723 (1963). While jurors need not be totally ignorant of the case, neither is a juror's assurance that he or she can act impartially dispositive of the question. The ultimate issue is the fairness of the proceeding. *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975).

The United States Supreme Court recently reaffirmed these fundamental principles. In *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, the Court, upholding a Nevada Supreme Court rule restricting lawyers' extrajudicial comments to the press, stated that the nation's criminal justice system is founded on the theory that the outcome of a criminal trial is to be decided by impartial jurors who know as little as possible of the case, and that, therefore, an outcome tainted by extrajudicial statements discussing evidence that might never be admitted at trial would violate the defendant's right to a fair trial.

To obtain a change of venue because of unfavorable pre-trial publicity, a defendant need not always demonstrate that such publicity had an adverse effect on the jury. If the publicity is pervasive enough, a defendant will be entitled to a change of venue without an examination of the effect of the publicity upon the jury members, actual prejudice being presumed. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, supra. Thus, a change of venue may be constitutionally required if the pretrial publicity creates actual prejudice, or if it creates a pervasive community prejudice, so that actual prejudice should be presumed. E.g., U.S. v. Alvarez, 755 F.2d 830 (11th Cir. 1985), cert. denied, 414 U.S. 905; U.S. v. Rewald, 889 F.2d 836 (9th Cir. 1989), opinion amended, 902 F.2d 18, cert. denied, 111 S.Ct. 64. In Petitioner's case, the venue of the trial should have been changed, both because the nature, extent, and timing of the publicity required a presumptive finding of prejudice, and because jury selection procedures demonstrated that actual prejudice had invaded the jury box.

(a) Presumed Prejudice

A presumptive finding of prejudice requiring a change of venue rests on an examination of the nature, extent, and timing of the publicity: the more inflammatory the publicity, the wider and more pervasive its dissemination, and the closer in time it occurs to trial, the more likely that a finding of presumptive prejudice will be constitutionally required. See, generally, Annotation, 33

A.L.R. 3d 17, 45-58. See also U.S. v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990), cert. denied, 111 S.Ct. 2811; U.S. v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992). In Petitioner's case, all three factors argued in favor of a change of venue. The publicity was pervasive and highly unfavorable to Petitioner. Front-page coverage continued up to and through the trial. Equally important, articles, radio and T.V. features appeared containing prejudicial extrajudicial facts.

The drum beat of publicity began on the afternoon of the killing with a front-page banner headline in the Tucson Citizen --"Banker Slain in Robbery." The article, though primarily factual, discussed the murder weapon, gave information about the victims, and provided a description of the suspects. More important, the article, like many others to follow, linked the two suspects, implying that both had participated in the killing. This article, like others, made the allegation that the killing had occurred because the robbers became angry when the victim was unable to open the safe. This accusation directly contradicted important evidence favorable to both Defendants showing that Karl had acted alone while Walter was out of the room and that Karl had reacted spontaneously and in a panic when the victim kicked him. Exhibit R.

Petitioner was identified the next day in a front-page banner headline in the Arizona Daily Star, which said, "Brothers Held in Stabbing Death of Manager in Marana Bank Office." Exhibit P. Again, Petitioner and Walter were linked and the message was that they acted together in killing the victim. Again, details of the crime were discussed, including the assertion that Dawn Lopez, a surviving victim, had been stabbed ten to fourteen times, that the victims' hands had been bound with electrical tape, and that Lopez had been ordered to take off her clothes. The accusation that the killing occurred because of Defendants' anger at the bank manager's failure to open the vault was repeated. This article is also significant because it initiated reports on one of the two controversies that generated a great deal of public interest in this case. It reported that a bank employee had called the Marana Town Marshall's Office while the crime was still in progress, but was told that the Marshall was too busy to investigate. From this point on, articles appeared concerning not only the crime itself, but the alleged failure of the Marshall's Office to timely respond, thereby keeping public interest in the matter high. Id.; see also, e.g., Exhibit P. In both of these first two articles, biographical details were given about the decease victim. Readers were told that Mr. Hartsock had served in the Air Force as an officer, had worked in military intelligence, and had lived in Tucson for almost thirty years. They also learned that he was survived by a wife and two children. Exhibit P. These and other details were repeated in subsequent stories, most prominently in a story about the town of Marana's decision to dedicate a public park in Mr. Hartsock's honor. Exhibit P. Many sympathetic articles also appeared about the wounded victim, Dawn Lopez. Exhibit P.

On the afternoon of January 8, 1982, an article appeared in the Tucson Citizen under the headline, "Brothers Held in Banker Killing: They Faced Previous Charges." Exhibit P. Thus, for the first time, readers learned that Petitioner and his Co-defendant had, at the time of the incident, been "awaiting charges on armed robbery and kidnapping in two October, 1981, supermarket holdups." Readers were also told that Petitioner had been released from jail the day before the killing, despite alleged objections from the County Attorney's Office. Id. This began the second controversy that piqued public interest in the case -- who was "responsible" for Petitioner's release? Thereafter, articles appeared containing accusations flying back and forth between various public officials on this question. E.g., Exhibit P. Indeed, several "citizens' watchdog" groups were founded in the wake of these accusations, and this too was covered E.g., Exhibit P. One article even covered the large number of petitions and complaints received by state legislators about this case and about release programs. Exhibit P. Potential jurors were, therefore, continually reminded of this highly prejudicial extrajudicial fact about Petitioner.

Additional facts concerning Walter LaGrand's past criminal record were revealed in the Arizona Daily Star headline article on January 9, 1992. Exhibit P. This article, headlined "Suspect Freed One Day Before Killing," reported that Petitioner "had spent fourteen months in state prison for robbing two convenience stores in 1980," and that Petitioner and Walter were being held on $1 million dollar bond each. The article contained a detailed discussion about Petitioner's release, including the fact that a

Superior Court judge had refused two prior motions to release him. This article also hinted at the high level of emotion that attended proceedings in this case. It reported that Commissioner Bret Harte, at Petitioner's arraignment, "warned that any spectator who talked would be ejected." Id. Articles over the next several days gave additional details of Petitioner's and Co-defendant's past criminal histories, and these details were reported in subsequent articles.

From January 8, 1982, until January 30, 1982, articles appeared on a daily basis in both the Citizen and the Star; thereafter, for the next several months, articles appeared about 1-2 times a week in both papers. Most of these appeared on the first or second page of the paper or on the first page of the "Metro" section. Some of these were factual, but others were very emotional. For example, on January 9, 1982, an article appeared on the front page of the Metro/State section of the Star, headlined "Slain Banker's Marana Friends Sad and Angry." Exhibit P. The article went on to quote many of these friends. Readers were told that Mr. Hartsock was a "good man," "like a father" to one young friend, "the best manager they ever had" at the branch, "well-liked by everybody," etc. Id. The second part of the article focused more on the interviewees' anger. Many were upset because Petitioner and Co-defendant had been "let out in the first place." One succinctly summed up the mood in the county by saying, "If they (Tucson officials) want to send those two out here, we'll have a trial, conviction and execution all today--save the taxpayers a lot of money." Id.

One memorable series of articles (mentioned, in fact, by several prospective jurors during voir dire two years later) were those discussing or providing transcripts of Dawn Lopez' 9-1-1 call immediately after the incident. Wounded and hysterical, Lopez talked for almost fifteen minutes about her pain and her fear of dying in what the Tucson Citizen, in a front-page article on January 21, 1982, called "an emotional phone call with sheriff's deputies." Exhibit P. The taped conversation, portions of which were also aired on radio and T.V., created, as might be expected, great sympathy for the victims and great rage at Defendants. It was, however, but one element in a turbulent emotional climate that made a fair trial in Pima County an impossibility for Walter and Karl.

Even those articles that were factual gave detailed reports on the progress of the police investigation, including summaries of the evidence against Petitioner.[19] The Tucson Citizen's second-page article of January 8, 1982, for example, contained a supposed "chronology of the crime," which contained erroneous assertions that one of the victims had been "slapped around" during the crime and that Hartsock may have been shot. Exhibit P. In some cases, articles about the case were coupled with related articles, such as the one appearing in the Star on January 13, 1982, in which a state representative called for an end to parole programs, citing Petitioner's case. In the course of this article, the state official referred to the crime as "heinous" and said Arizona citizens were "tired and disgusted with a government which offers them no protection." Exhibit P. Another article in the same paper the next day reported on the head of the Arizona House Judiciary Committee's attempts to "plug the loophole that freed" Petitioner. Exhibit P. The day after that, in the same paper, the Attorney General of Arizona called work furlough programs "out of hand." Exhibit P.

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[19] As one prospective juror later pointed out on voir dire, however, she never "read or heard anything that tells me they're not [guilty]." Indeed, very few of the articles even mentioned evidence favorable to the defense case, much less discussed it in any detail. T. 2/1/84, at 235 (Buchanan).

This general atmosphere of animus was augmented even by small articles that appeared on January 22, 1982, reporting that Walter and Karl had been "acting like bigshots" at the jail and that, as a result, Walter LaGrand had been struck by another inmate. Exhibit P. The public mood grew so hostile that both newspapers felt compelled to publish opinion pieces in which they called for calm. The Star published an editorial on January 22, 1892, which referred to "the public cry for revenge and reform brought on by a vicious attack on two Marana bank employees." It called the desire for vengeance "an understandable human reaction," but urged readers to direct their feelings toward "an honest and cool examination of the circumstances that ended in tragedy." Exhibit P. The Citizen, on January 13, 1982, published an opinion piece by columnist Jeff Smith, entitled, "Let Us Pause for a Moment of Rationality Amid Hysteria." This article accurately summarized the mood of the public at the time, a mood that had not dissipated even by the time of trial. As Smith said, "It appears the consensus would have the LaGrand brothers . . . swinging from the nearest tree." Even this article, despite its title, was hardly favorable to the defense; rather, it urged that the public "run Karl and Walter LaGrand through the mill and see whether it grinds them to dust or spits them back out again." Exhibit P. That both major newspapers felt compelled to publish such pleas for calm is clear evidence of the general community prejudice that surrounded this trial.

The controversy over the law enforcement response to the crime culminated in a January 24, 1982, series of articles appearing in the Metro/State section, collectively entitled, "Is Marana Protected?" One of the articles reported on citizen attempts to form a watch group in Marane. Exhibit P.

The number of prejudicial extrajudicial facts revealed in newspaper coverage both around the time of the crime and around the time of the trial was extraordinary. Besides Walter LaGrand's prior criminal record, the amount of his bond, and the circumstances surrounding his release, potential jurors were also told a great deal about the physical evidence in this case, much of it wrong or misleading. E.g., Exhibit P. Karl LaGrand's confession was the subject of many other articles, including articles covering charges and countercharges concerning the voluntariness of the confession and the circumstances under which it was taken. E.g., Exhibit P. Finally, there was extensive reporting on Petitioner and Walter's trial, conviction, and sentencing on unrelated robbery charges prior to the trial in the murder case. Exhibit P. Two articles even reported on the prosecution's unsuccessful attempt to obtain a gag order against a defense attorney in that case. Exhibit P.

This case was closely followed by radio and television as well. Only a fraction of these features is preserved in the record, see Exhibit P, but many prospective jurors referred during voir dire to the general pervasiveness of electronic media coverage. See, e.g., T. 2/1/84, at pp. 225-26 (Buchanan); 2/2/84, pp. 456-57 (Cox); 2/3/84, pp. 560-70 (Carlson); p. 621-31 (Hambrick). The crime was immediately cast as a major media event. One commentator said it was a "long time since Marana has seen anything so gruesome." Exhibit P. Initial television reports presented many of the same facts as the initial newspaper articles, including details of the crime (correct and incorrect), defendants' prior records and pending charges, Petitioner's beating by fellow inmates, and, most prominently, the controversy over Petitioner's pretrial release. Representatives of the police and prosecutor's office held press conferences and decried the release, calling it "reprehensible" and "a glaring mistake of judgment."

The images conveyed by television news features were especially prejudicial to Petitioner. Photographs of the victim were broadcast repeatedly. Defendants were shown (always together) shackled and in jail garb being transported to and from court appearances. One feature showed Defendants' arrest, including images of Karl struggling and screaming hysterically, "Get away from me." Exhibit P. Defendants were linked by words as well, viewers being told repeatedly that the "pair" had killed Mr. Hartsock. Exhibit P. The commentary, though not, of course, as detailed as the print commentary, was equally one-sided. For example, viewers were told in one report that Defendants killed Hartsock because he was trying to "protect" Dawn Lopez. Id. Petitioner urges the District Court to review the television news tapes, incomplete as they are; they give a sense of the charged atmosphere that surrounded this case from start to finish.

Courts have not hesitated to presume prejudice when media coverage has reached the levels found in Petitioner's case. In Rideau v. Louisiana, supra, the media broadcast an interview of the defendant by a sheriff in which the sheriff interrogated the defendant and obtained admissions that defendant had perpetrated the crimes with which he was later charged. Three jurors had heard the interview. The Court reversed Rideau's conviction and death sentence even though the trial had been conducted two months after the broadcast and even though there was no showing of any nexus between the broadcast and the trial. The Court held that due process required a trial before a jury selected from a community that had not seen and heard Rideau's televised interview. Id., at 726-727.

Similarly, in Estes v. Texas, supra, the Court reversed the conviction of a well-known financier because of the presumed prejudice resulting from the filming and broadcasting of his trial and other courtroom procedures. The Court noted that an actual showing of prejudice is not a prerequisite to reversal in every case.

The Court granted habeas relief to the petitioner in Sheppard v. Maxwell, supra, where, both before and during trial the petitioner had been the subject of extensive newspaper, radio, and T.V. publicity, including many matters unfavorable to the petitioner which were never admitted in evidence. The Court granted relief, not because actual prejudice was certain, but because there was a mere "probability of unfairness." Id., at 620, quoting In Re Murchison, 349 U.S. 133, 136 (1955). A change of venue or other steps to abate the possibility of prejudice (such as a continuance) were required, the Court held, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial. . . ." Sheppard, at 620.

In the more recent case of Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), rehearing denied, 782 F.2d 896, cert. denied, 476 U.S. 1194, presumed prejudice was found where the publicity consisted of numerous factual and opinion articles, as well as broadcast and word-of-mouth communications, up to and through trial. The evidence showed that the community as a whole was predisposed as to both guilt and sentence. The publicity covered the facts of the crime, defendants' backgrounds, the impact of the crime on the victim, and the unfavorable opinions of law enforcement personnel and local politicians. In these circumstances, as in the above-cited cases, there was no necessity for the defendant to establish a "nexus" between the publicity and the trial. Importantly, in Coleman, a voir dire in which all empaneled jurors stated that they could act impartially did not remove the taint of presumed prejudice. The court held that, even were it possible to rebut the presumption of prejudice under Rideau, a voir dire that took place in the presence of other jurors and consisted mostly of leading questions was insufficient.

Finally, in United States v. Ebens, 654 F.Supp. 144 (E.D. Mich. 1987), extensive pretrial publicity, including a public outcry concerning the failure of punishment, a prejudicial magazine article on the victim's mother, and the city's declaration of a day of mourning in honor of the victim, presumptively precluded a fair trial. In that case, the District Court concluded that the presumption of prejudice was so strong that it could not be cured by even the most careful voir dire and that it would be "extremely wasteful to attempt to do so," recognizing that even probing jury questioning cannot remove the corruption of the venire that occurs when pretrial publicity is widespread. Id. 654 F.Supp. at 146.

In Petitioner's case, that prospective jurors who had knowledge of the case professed, in response to leading questions, they could be "fair," does little, if anything, to rebut the presumption of prejudice. Knowledge of the crime, sympathy for the victims, and animosity toward Walter and Karl had reached such proportions by the time of trial that a fair trial by an impartial jury in Pima County was certainly highly improbable, if not impossible.

(b) Actual Prejudice

Even where pretrial publicity does not rise to the level of presumptive prejudice, a change of venue is constitutionally required upon a showing of actual prejudice. The key question is whether the venire, not necessarily the actual jury selected, has been affected by adverse publicity. Swindler v. Lockhart, 693 F. Supp. (E.D. Ark. 1988), aff'd, 885 F.2d 1342. If a high percentage of potential jurors admit to disqualifying prejudice, this alone may indicate the existence of actual prejudice requiring a change of venue. U.S. v. Dischner, 960 F.2d 870 (9th Cir. 1992).

The first indication that the venire in Petitioner's case was corrupted occurred during the first day of jury selection. The trial judge called 34 potential jurors into the jury box. He then asked how many had heard or read about the case. Twenty-nine of the thirty-four indicated that they had such knowledge. T. 1/31/84, at p. 44. Thus, 85% of the venire had prior knowledge of the case.[20] Later on that day, three additional prospective jurors were called to replace those stricken for cause; all three had heard or read about the case, indicating that media penetration of the venire was probably closer to 90%. T. 1/31/84, at pp. 70-107.

Because of this case's exceptionally high profile, the trial judge, over the next several days, attempted to find an impartial jury through individual voir dire. His efforts were hampered (to say the least) by, among other things, the discovery that copies of the Arizona Daily Star containing an article about the case were being read by prospective jurors in the jury assembly room. This article is worthy of particular note, not only because it was read immediately before trial by some jury panel members, but because of the extremely prejudicial information it contained. The article, which appeared on page 1 of the widely-read "Metro/State" section of the Star on January 31, 1984, was headlined "Suspect in Bank-Holdup Sleying Denied New Lawyer." In the second paragraph of the article, Karl LaGrand was quoted as saying that his lawyer had "stated to me there was no defense. I was going to get found guilty of murder one." Exhibit P. The article also reported that Karl had complained that his lawyer had only conferred with him a few times and hadn't had time to prepare an adequate defense. Id. Apart from Karl's comments, the reporter noted that one lawyer had already withdrawn from Karl's defense, that several defense motions had been denied, that the co-defendants were planning mutually-antagonistic defenses, and numerous other extrajudicial facts. Of the panel members questioned, no fewer than four admitted reading the article. T. 2/1/84, at pp. 175-186 (Eddy), 191-213 (Pike), 307-325 (Tucker); 2/2/84, at pp. 421-434 (Guzman). Three were removed for cause, but the fourth, Mr. Pike, was not, even though challenged by the defense and even though he recalled that the article said one defendant (he couldn't remember which) was not happy with his lawyers and did not feel his case was being presented well. T., 2/1/84, at pp. 194-195, 204-211.

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[20] Of these, 4 indicated that they had personal knowledge in addition to what they had heard and read in the media.

The most important factor in any analysis of actual prejudice is the percentage of prospective jurors disqualified for cause due to pre-trial publicity. Murphy v. Florida, 421 U.S. at 805. In Petitioner's case, some 14 potential jurors were eventually disqualified for this reason--approximately 30% of the total panel called.[21] Nor did the actual jury escape the effects of this prejudice. Both Defendants exhausted their peremptory challenges (a total of 10). Nevertheless, of the 14 jurors and alternates empaneled, at least seven had admitted that they had prior knowledge of the case. This extraordinary showing of actual prejudice made a change of venue constitutionally required.

The first case in which the United States Supreme Court considered a showing of actual prejudice was Marshall v. U.S., 360 U.S. 310 (1959). That opinion, though based on the Court's supervisory powers over the Federal Courts, makes instructive reading. Marshall was convicted of unlawfully dispensing prescription drugs. The trial judge had refused to allow the Government to prove that the defendant had previously practiced medicine without a license. Nevertheless, during trial, two newspapers containing such information reached "a substantial number of jurors." The newspaper articles also mentioned Marshall's two previous felony convictions. Upon questioning by the trial judge, seven jurors stated they had read or seen one or both of the articles; all, however, insisted they could make a decision not influenced by the articles. The trial judge, therefore, denied defendant's motion for a mistrial.

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[21] These numbers are more than 50% greater than those found insufficient in two recent Ninth Circuit cases, U.S. v. Dischner, 960 F.2d at 892 (16.7%), and Harris v. Pulley, 885 F.2d 1354, 1363-64 (1988) (18.5%).

The Supreme Court reversed, holding that the trial judge had abused his discretion. The Court pointed out that:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. (Citation omitted) It may indeed be greater for it is then not tempered by protective procedures.

Id., at 1252. Marshall, like Petitioner, had no opportunity to rebut the prejudicial information members of his jury had learned from newspaper accounts. Both were deprived of a fair trial by an impartial jury.

In Irwin v. Dowd, supra, defendant was charged with the commission of six murders. The crimes were extensively reported by the local news media, arousing "great excitement and indignation." The Court, after noting that the Constitution establishes no particular test, held that, where eight jurors had seen or heard newspaper or T.V. accounts of the crime, including Petitioner's confession and allegations of other crimes, no fair trial could be had. The Court took a realistic view of the jury's exposure to adverse publicity, stating "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id., at 727, citing Delaney v. U.S., 199 F.2d 107. The change of venue to a new county was the only means by which the pernicious influence of fixed opinions could be eliminated.

A number of cases have dealt with the prejudicial effects of jurors reading newspaper accounts during trial, most notably Marshall v. U.S., supra. Both state and federal courts have held that a juror's reading of a prejudicial newspaper account of a criminal trial during the proceedings is grounds for a new trial or reversal. Annotation, 85 A.L.R. Fed. 1, § 5; Annotation, A.L.R. 4th 11, § 7. These cases, while not directly pertinent to the instant one, are closely analogous; they recognize the extreme unfairness to an accused of being tried by a jury whose members have been exposed to prejudicial extrajudicial information near in time to their deliberations and verdict. Two of the cases cited in the annotations deserve particular note. In People v. Holloway, 50 Cal. 3rd 1098, 269 Cal. Rpt. 530, 730 P.2d 1327 (1990), the court held that the trial court had erroneously failed to order a mistrial based on juror misconduct when it discovered that one of the jurors had read a newspaper article on the second day of trial, which stated that the accused was on parole from prison after having served time for assault, and which otherwise revealed prejudicial information about the accused not admissible in court. Significantly, the juror's conduct was considered prejudicial, notwithstanding his failure to disclose any of the offending information to the other jurors. A similar result obtained in a Ninth Circuit case, United States v. Smith, 790 F.2d 789 (1986).

But the showing of actual prejudice in Petitioner's case is not based on any single event. The extensive prejudicial media coverage, outlined earlier, combined with the clear evidence that this coverage had reached the prospective jurors, mandated a change of venue. Despite a careful and searching inquiry, including individual voir dire, Petitioner was tried by a jury, half the members of which had prior knowledge of the case. Petitioner exhausted his peremptory challenges removing jurors who had admitted detailed knowledge of the case, including, for example, the victim's 9-1-1 call transcript. See, e.g., T. 2/1/84, at pp. 124-135 (Rosengard); 2/2/84, at pp. 475-495 (Shonk); 2/3/84, at pp. 560-570 (Carlson). Numerous courts have held that defendants in similar circumstances were deprived of their constitutional right to a fair trial and have granted reversals. See, e.g., People v. Williams, 259 Cal. Rptr. 473, 774 P.2d 146 (Cal. 1989) (there was a reasonable likelihood Black defendant charged with capital murder of white woman could not receive fair trial due to pretrial publicity where there was extensive pretrial publicity and jury selection process showed jurors' widespread familiarity with the crime); State v. Robinson, 389 N.W.2d 401 (Iowa 1986); Fisher v. State, 481 So. 2d 203 (Miss. 1985); People v. Taylor, 462 N.E.2d 478 (Ill. 1984)(in murder prosecution, court improperly refused change of venue where both venire and jury exhibited familiarity with the case, particularly with inadmissible results of co-defendant's polygraph test); State v. Clark, 442 So.2d 1129 (La. 1983); People v. Botham, 629 P.2d 589 (Colo. 1981)(first-degree murder conviction reversed where approximately 60% of the prospective jurors questioned had detailed knowledge of the crime and had expressed the opinion, at one time or another, that defendant was guilty); Commonwealth v. Frazier, 369 A.2d 1224 (Pa.

1979); People v. Culhane, 33 N.Y.2d 90, 350 N.Y.S.2d 381, 305 N.E.2d 469 (1973)(change of venue required in murder prosecution where extensive pretrial publicity resulted in difficulty in jury selection, causing defendant to exhaust peremptory challenges); State v. Shawan, 423 P.2d 39 (N.M. 1967)(change of venue required where seven members of jury panel had read or heard about the case); Coates v. State, 773 P.2d 1281 (Okla. Crim. 1989) (change of venue should have been granted where crime was well publicized and most potential jurors were familiar with the case; four of 25 potential jurors had opinions about the case); People v. Brensic, 136 App. Div. 2d 169, 526 N.Y.S.2d 968 (1988) (in murder prosecution, change of venue should have been granted where high percentage of prospective jurors, five of whom were seated, had knowledge of case); Nickolai v. State, 708 P.2d 1292 (Alaska App. 1985); Re Miller, 33 Cal. App. 3d 1005, 109 Cal. Rptr. 648 (1973) (murder defendant should have been granted change of venue where only three of 41 prospective jurors had not read or heard of case, and seven had formed opinions).

As in the above-cited cases, the jury selection process in Petitioner's case did not dispel, but rather confirmed, the presumption of prejudice. The difficulties that occurred during the jury selection process, combined with the other evidence of community prejudice in this case, provide an ample showing of actual prejudice, both as to the jury panel and the jurors and alternates selected. This prejudice so permeated the trial that it changed the result. A less prejudiced jury would have found

Petitioner innocent of the murder and attempted murder, or at worst would have found him guilty of the lesser-included offense.

3. The failure to notify the Petitioner of his right to inform the German consulate of his arrest, as required by international treaty, violated the Petitioner's rights under the fifth, sixth and fourteenth amendments to the United States Constitution

The Arizona authorities violated the Vienna Convention on Consular Relations, a multi-lateral international treaty, Exhibit Q, to which Germany and the United States are signatories, by failing to notify Mr. LaGrand upon arrest of his right under the Convention to inform his home consulate of his detention. The consulate, which functions to protect the interests of its nationals, would have been in a position to render Mr. LaGrand vital assistance had it been informed of his situation. In failing to honor Mr. LaGrand's internationally-recognized rights, the State of Arizona denied Mr. LaGrand due process of law. In addition, the State denied him the right under the compulsory process clause of the sixth amendment to obtain favorable witnesses. As a result of this serious violation of international law, the trial court was deprived of significant mitigating evidence which in all probability would have altered the outcome of the penalty phase for Mr. LaGrand.

(a) The Vienna Convention on Consular Relations.

Article 36 of the Vienna Convention on Consular Relations of 1963 provides that:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state...

> (a) Consular officials shall be free to communicate with nationals of the sending state and to have access to them...
>
> (b) If he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner....The said authority shall inform the person concerned without delay of his rights under this subparagraph.
>
> (c) Consular officials shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation....

Vienna Convention on Consular Relations, April 23, 1963, TIAS 6820, 21 U.S.T. 77, 596 UNTS 261 (emphasis added) See Exhibit Q. The Convention was ratified by the United States Senate of December 24, 1969; as a ratified treaty, it is the supreme law of the land. United States Constitution, article IV, clause 2; See, e.g., Foster v. Neilson, 27 U.S.(2) PET. (252, 314) (1929). The duties made mandatory by article 36 are as binding on Arizona officials as a federal statute.

(b) The significance of the rights provided by Article 36

The United States government regards the notification requirement as an obligation "of the highest order that should not be dealt with lightly". State Representation, 1973 Digest § 2 at

161 (Statement of the Department of State, October 24, 1973). State Department and consular officials immediately intervene diplomatically and strongly protest upon discovering that another nation has failed to notify a detained United States citizen of his Vienna Convention rights. State Representation, 1975 Digest § 2 at 149 (United States responds to an article 36 violation by Syria).

As the United States recognizes, notification to an arrestee of his rights under article 36 is essential to insuring that a foreigner has his government's protection and assistance as soon as he is confronted with another nation's criminal justice system.[22] Early notification and access to an arrestee is crucial:

> In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse and to provide a list of lawyers and a legal system fact sheet to prisoners.

State Representation, 1980 Digest § 2 at 360.

Immediate notification of a detainment allows the home consulate to intervene at a crucial point to gather critical information and contact those who are best able to aid the accused.

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[22] The Vienna Convention expressly states that consular functions include "helping and assisting nationals" and "protecting...the interests of the sending state and its nationals." Vienna Convention on Consular Relations, article IV(b) and (e). *See also, Vienna Convention on Diplomatic Relations*, 23 U.S.T. 3230 (1961); Luke T. Lee, Consular Law and Practice 134 (1991) (protection of and assistance to nationals is a consulate's primary function).

Aid at an early stage of the proceedings is so critical that the United States demands the foreign governments act "as quickly as possible, and in any event, no later than the passage of a few days" to inform our consular officials of an arrest. 1975 Digest, State Representation, § 2 at 249.

(c) The German assistance that Mr. LaGrand would have received had his rights not been violated.

Most consulates have a mandate to protect and assist their nationals who live and travel abroad and to respond promptly when they find themselves in distress. This function is one to which the government attaches a high priority. The countries who signed the treaty, like the United States, regard the rights provided under 36 as basic to this function.

Immediately upon being contacted by undersigned counsel (in 1992), the German consulate made arrangements to travel to Florence, Arizona to visit Mr. LaGrand and to determine his origin. Mr. LaGrand's mother is a German citizen and Mr. LaGrand was born in Germany. He spent his first six years living in Germany until his mother married and her new husband, Massie LaGrand, adopted Karl LaGrand and transferred the family back to the United States. The LaGrands were transferred back to Germany when Karl was approximately eight years old for a short period of time due to Mr. Massie LaGrand's military service. Thereafter, they returned to the United States and lived in Arizona.

The consulate has now contacted the LaGrands, and are in constant communication with them at this present time. They have travelled to Florence, Arizona and personally met with Mr. LaGrand and have indicated their support for Mr. LaGrand. The German consulate has made it clear that the Republic of Germany is absolutely against capital punishment and will work to assist Mr. LaGrand in any way that they possibly can.

If the consulate had been contacted immediately upon the arrest, they would have been in contact with Mr. LaGrand back in 1984. They would have been able to obtain information concerning the specific charges and whether Mr. LaGrand was able to provide financially for his defense. They could have assisted Mr. LaGrand in obtaining effective assistance of counsel at that time. The consulate would have also acted as a conduit to the home government. The consulate could have located family and friends who could have assisted the detainee and provided significant, relevant mitigating evidence. The consulate also could have provided assistance to trial counsel and they may have attended and followed the legal proceedings.

These valuable procedures insure that a detainee's rights are protected through every stage of the foreign legal proceedings and that those proceedings meet standards required by international law. But the home state is dependent upon the detaining state and its commitment to its duties under international law to set the procedural safeguards in motion. If the detaining state does not honor its obligation to inform the arrestee of his rights, the home state may never learn of the detainment. The national is left unprotected, perhaps unable to communicate his whereabouts and his predicament to family and friends.

(d) Failure to notify Mr. LaGrand of his rights under the Convention violated his rights under the fifth, sixth and fourteenth amendments to the United States Constitution

Violation of Mr. LaGrand's rights under the Vienna Convention resulted in a capital sentencing phase in which virtually no mitigating evidence was available or presented. Hearing only government characterizations of Mr. LaGrand and without the benefit of a complete family history and background, the trial court was not in a position to make an informed decision regarding whether there were significant mitigating factors to outweigh the aggravating factors found in this case. The death sentence resulted directly from the denial of Mr. LaGrand's vital procedural rights. This serious violation of international law sets Mr. LaGrand's case apart from the vast majority of Arizona capital cases, it raises uncommonly compelling constitutional issues under the due process clauses of the fifth and fourteenth amendments and particularly under the compulsory process clause of the sixth amendment.

(e) Claims arising under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments are measured against a "materiality" standard.

The compulsory process clause of the sixth amendment[23] secures for the criminal defendant "the right to offer the testimony of witnesses...in plain terms to the right to present a defense...the right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The right to compulsory process has been incorporated by the fourteenth amendment and is applicable to the states, and it "stands on no lesser footing than other sixth amendment rights..." *Washington v. Texas*, *supra*, 388 U.S. at 18. In *Washington*, the court held that "the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and *whose testimony would have been relevant and material to the defense*." 388 U.S. at 23 (emphasis added). Resident aliens are entitled to this right and to all other rights under the fifth, sixth and fourteenth amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

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[23] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance

Thus, appeals asserting violations of the compulsory process clause of the sixth amendment, unlike appeals under the adjacent assistance of counsel clause, are measure against the more liberal "materiality" standard. Compulsory process clause analysis is entirely divorced from sixth amendment considerations under the assistance of counsel clause. Instead, it often merges with

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of counsel for his defense. United States Constitution Amendment Six (emphasis added).

"fundamental fairness" analysis under the due process clause of the fifth and fourteenth amendments. See, e.g., Crane v. Kentucky, 476 U.S. 683, 690-691 (1986) (defendant's constitutional rights violated by exclusion of testimony about the physical and psychological environment in which his confession was obtained). "Whether rooted directed in the due process clause of the fourteenth amendment or in the compulsory process or confrontation clause of the sixth amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Id. These clauses require, at the very least, that the government take no improper action that has the effect of blocking the defendant's ability to gather exculpatory or mitigating evidence. Indeed, as the court suggested in United States v. Nixon, 488 U.S. 683 (1974), the clauses can in fact plausibly be read to affirmatively require government production of relevant evidence:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The sixth amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor'. Moreover, the fifth amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

Id. at 711.

The less stringent "materiality" standard for claims brought under the compulsory process clause, as well as the close relationship between that clause and the due process clause, was reaffirmed in United States v. Valenzuela-Bernal, 458 U.S. 858 (1983), the leading case involving the compulsory process clause as applied to foreign nationals. The defendant in Valenzuela-Bernal alleged that the deportation, prior to his trial, of illegal aliens who had witnessed the alleged crime, violated the compulsory process clause and the due process clause. The court upheld the conviction in Valenzuela-Bernal because the defendant had been utterly unable to make "some plausible explanation of the assistance he would have received from the testimony," Id. at 871, and because prompt deportation of the alien witnesses in that case satisfied immigration policy and was "justified by several other practical considerations". Id. at 865. However, the court articulated the general standard unequivocally, and it is clear from the Valenzuela-Bernal case that a criminal defendant's sixth amendment right to compulsory process is violated when the government arbitrarily prevents the defendant from introducing evidence that would have been both material and favorable to the defense.[24]

The "materiality" standard also applies when the violation of international law in Mr. LaGrand's case is examined under the due process clause of the fifth and fourteenth amendments. See, Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecution's suppression of favorable evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). In Brady, the court held that the criminal defendant's due process rights were violated when the prosecution denied him access to the confession of his co-defendant, who had been tried separately. Similarly, because this violation of international law in the present case had the effect of denying Mr. LaGrand the testimony of family and friends, who would have offered non-cumulative evidence about Mr. LaGrand's childhood, family background, and mental health clearly material to punishment, the state's action rises to the level of a constitutional due process violation under the Brady standard.

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[24] Sanctions may be imposed on the government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. Id. at 873.

(f) The facts of Mr. LaGrand's case and the circumstances of his death sentence meet the "materiality" standard of the due process and compulsory process clauses

For Mr. LaGrand's case, analysis under either the compulsory process clause or the due process clause compels the same result, because the standard for constitutional violation is the same. "A violation of these provisions requires some showing that the evidence lost by arbitrary government action would be both material and favorable to the defense." United State v. Valenzuela-Bernal, supra, 458 U.S. at 873. The element of arbitrariness is satisfied in Mr. LaGrand's case, where the state violated international law without any countervailing state interest such as the immigration laws and policies at work in Valenzuela-Bernal. For the "material and favorable" inquiry, the defense must only show that it is plausible that the testimony of Mr. LaGrand's family members and friend and neighbors would have the requisite material and favorable effect. With regard to the sentencing phase at least, this lower threshold is met: the facts set forth in the affidavits attached and through interviews with the family members living in Arizona indicate that there was mitigating evidence as well as evidence of Mr. LaGrand's mental health that was crucial information and which was never raised during trial or at the penalty phase. See, e.g., Lockett v. Ohio, 438 U.S. 586, 602 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Furman v. Georgia, 408 U.S. 238, 286-291 (1972). To this end, any relevant mitigating evidence is essential. Jurek v. Texas, 428 U.S. 262, 271 (1976).

(g) Prior cases decided under the due process and compulsory process clauses provide powerful precedent for finding a violation of Mr. LaGrand's constitutional rights

The Supreme Court's vigilance against the sort of government action that has deprived Mr. LaGrand of his right to compulsory process has an impressive historical pedigree. Thirty-five years ago, the court in Roviaro v. United States, 353 U.S. 53 (1957), reversed a conviction on the principle that, whenever the government must disclose a witnesses' identify to the defendant, it must also take reasonable steps to obtain the information needed in order for the defendant to find the witness. Id. at 64-65. This is in many important ways a mirror image of the LaGrand case: Roviaro's principle applied to somewhat inverse facts, should hold where international law compels the government to facilitate the discovery of the defendant's identity and whereabouts by his consulate and by other with the means to aid him, the compulsory process requirement compels the state, in essence, to make reasonable efforts to obtain and convey the information necessary in order for the witnesses to find the defendant, an arbitrary failure to do this amounts to a constitutional violation whenever the defendant's access to plausibly material and favorable evidence is effectively obstructed.

This state's failure to abide by the Vienna Convention - to notify Mr. LaGrand of his right to contact his consulate - is sufficient to demonstrate a violation of the compulsory process and due process clauses, because it has been long established that the state need act specifically or even affirmatively to prevent testimony in order to trigger a constitutional remedy. In Webb v. Texas, 409 U.S. 95 (1972), the witness was not prevented from testifying, but rather merely was discouraged by the judge's warning of the consequences of perjury. "In light of the great disparity between the posture of the presiding judge and that of witnesses in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether to testify." Id. at 98. The judge's actions "effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the fourteenth amendment." Id. (emphasis added).

A similar -- if not a greater -- disparity in "posture" existed here between the state and the alien prisoner they had seized, Mr. LaGrand. The state's failure to honor a foreign national's rights under international law effectively prevented the discovery and introduction of crucial testimonial evidence about the defendant's history and background that quite plausibly would have a material impact on his sentence. This failure rises to the level of a constitutional violation. See, Penry v. Lynaugh, 492 U.S. 302 (1989) (Texas sentencing scheme as applied to habeas corpus petitioner held unconstitutional because the jury was unable to give effect mitigating evidence of childhood abuse and mental retardation as bearing on his personal culpability); Grandviel v. Lynaugh, 881 F.2d 185, 198 (5th Cir. 1989) ("The eighth and fourteenth amendments require that the defendant in a capital case be permitted to present for the jury's consideration during the punishment phase any mitigating evidence regarding the defendant's character, prior record, or the circumstances of the defendant's crime.")

The government's failure to compel properly with normal procedure triggers the compulsory process clause. In United States v. Theresius Filippi, 918 F.2d 244 (1st Cir. 1990) (conviction upheld on other grounds), the Court of Appeals concluded that the defendant's constitutional right to compulsory process was violated with the United States did not meet its requirement to make a witness' appearance possible by requesting special interest parole from the I.N.S. "Such a deliberate omission to act, where action was required, by the United States Attorney constitutes a violation of the sixth amendment right compulsory process and, derivatively, the right to due process protected by the fifth amendment." Id. at 247. As in Theresius Filippi, government action in Mr. LaGrand's case was mandated -- hereby an international treaty to which the United States is a signatory -- and mandated for the same ultimate purpose: to secure the defendant's access to all potentially mitigating material evidence.

The Vienna Convention violation had, in these circumstances, the effect of denying Mr. LaGrand crucial testimony relevant to the jury's answers to the special questions on sentencing. It is the effect -- what happened under the particular circumstances -- to which compulsory process analysis directs a court's focus. United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974). The defendant's constitutional right to compulsory process includes the "right to formulate his defenses uninhibited by government conduct that, in effect prevents him from interviewing witnesses who may have been involved and from determining whether he will subpoena and call them in his defense." Id. at 423 (emphasis added). The Tsutagawa court emphasized that the government put the witnesses beyond the reach of the defendant "for all practical purposes". Id. In this case, the state's flaunting of international law had the effect of depriving Mr. LaGrand of family and friendly testimony. As in Tsutagawa, the foreclosure of key testimony "for all practical purposes" amounts to a violation of the compulsory process and due process clauses.

(h) The Vienna Convention and the due process and compulsory process clauses of the constitution strive to protect the same fundamental rights

It is precisely to avoid the sort of calamitous scenario that has been played out in this case, that the Vienna Convention specifically requires that the arresting country advise the defendant of his right to contact his consulate. A foreign national such as Mr. LaGrand has been granted rights under international law specifically so that he may notify his home government, which can then begin to use its resources to provide information imperative to the administration of justice and due process of law. This information is for all practical purposes otherwise unavailable to the court or to the defendant himself; it is information, vital to a "fundamentally fair" result, that will remain tragically beyond the court's reach unless the fact of the defendant's arrest becomes known to his consulate, and by extension to his country and family members, as well as associates. The United States Supreme Court has affirmed that:

> Cases establish, at a minimum that under the compulsory process clause criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.

Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

Whether he deserved more help "in compelling the attendance of favorable witnesses," Mr. LaGrand, at the very least, deserved access to the information guaranteed to him by international law. That this simple, crucial notification was denied to him, in a prosecution in which the state sought the death penalty, is constitutionally intolerable. See, California v. Brown, 479 U.S. 538, 541-542 (1987) (O'Connor, J., concurring) ("Consideration of any relevant mitigating evidence regarding character and the circumstances of the offense is a 'constitutionally indispensable part of the process of inflicting the penalty of death'.")

The United States has signed a treaty, binding under international law, that mandates a process by which an alien defendant maintains his right to create an adequate defense by securing at least a minimal level of assistance in finding relevant information and evidence, and in securing important foreign witnesses who lie beyond subpoena power. The safety of all foreign nationals of signatory countries -- including Americans seized abroad -- is dependent upon international cooperation. In the circumstances of this case, the failure of our nation to live up to international obligations it has sworn to undertake has had devastating consequences for Mr. LaGrand -- consequences not permitted by our constitution. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence where the judge, as a matter of law, refused to consider in mitigation the defendant's turbulent family history, emotional disturbance, and youth at time of the offense); Lockett v. Ohio, 438 U.S. 586 (1978) (death sentence held unconstitutional because a limited range of mitigating circumstances under the Ohio statute precluded consideration of a factor such as the defendant's character and prior record).

(i) The violation of international law and of Mr. LaGrand's constitutional rights mandates the invalidation of his death sentence

Focusing on the sentencing phase of Mr. LaGrand's trial, clearly it is plausible that this lack mitigating evidence during the penalty phase deprived the trial judge of evidence extremely relevant and material to any consideration of a capital sentence: because Mr. LaGrand was denied his constitutional right to compulsory process, the court did not recieve first-hand knowledge from the German perspective about the fact that he was raised in Germany with a black step-father, a German woman national as his mother and placed for the first few years of his life with his maternal grandmother and then, when she became ill, in a Catholic orphanage of ill repute. Nor was the court aware that his natural father was black. The trial court was also denied information regarding the abusive childhood from the alcoholic step-father, the stigment of having a mixed parental background, troubled family history and information regarding his mother's placement in an interment camp during World War II.

Mr. LaGrand's conviction and sentencing no doubt contained many similarities with other capital cases; however, his is critically distinctive in at least this one respect -- it arises in the context of a clear violation of international law. The notification rights safeguarded by the Vienna Convention are particularly important in an international case such as this. See, United States v. Ismaili, 828 F.2d 153, 171 n.4 (3rd Cir. 1987) (stressing "that compulsory process clause values, working through the due process clause, created some kind of a guarantee to the testimony of foreign witnesses if their testimony was material even when the government was without power to procure their testimony").

In the international context, cooperation among nations is crucial. The Vienna Convention provides an important mechanism, imbued with the force of international law, for contacting relevant witnesses and for identifying and obtaining relevant evidence. Our government has pledged to honor this mechanism and to facilitate its operation -- a pledge that was, in Mr. LaGrand's case, ignored by the state. Such a violation cannot be abided; it is imperative that international law be respected, particularly when the stakes are so high. Our State Department surely would expect no less of another signatory nation if an American citizen was seized, tried, convicted and sentenced to death.

Legal issues arising from violations of the Vienna Convention are not common in United States courts under any circumstances -- but particularly not in a case like Mr. LaGrand's, where the violation threatens to exact the ultimate human cost. Still, it is clear that federal courts considering the ramifications of the Vienna Convention's violation have been prepared to measure the harm against the constitutional standard, had the defendants been able to offer any evidence at all that the Convention's violation denied them their rights. In Mami v. Zandtz, 1989 W.L. 52308 (S.D.N.Y. 1989), the petitioner's claim that "he was deprived of his rights under article 36 of the Vienna Convention" was denied because he failed to "indicate how any constitutional right was violated" or to describe "what the Jordanian diplomatic officials could have done for him." *Id*. Mr. LaGrand, on the other hand, presents a compelling story of a birth, his initial infancy and adolescent years in a country with strong racial prejudice against mixed marriages and placement in an orphanage in such a country. He further asserts what his home government could have done for him had it been properly and immediately notified. The state's arbitrary disregard for the Vienna Convention has worked to Mr. LaGrand's material disadvantage. In fact, it threatens to cost him his life.

In assessing the severity of a Vienna Convention violation in the context of an appeal from a deportation order, the court in *United States v. Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980), could easily have been describing Mr. LaGrand's case:

> The evidence presented by the defendant...took the form of several affidavits. Defendant's own affidavit stated that he did not know he had a right to consult with the Mexican consulate, and that he believed that he would have contacted the Mexican consulate had he known he could do so. The affidavit of the Mexican Consul General in Seattle stated that his office would visit an alien who called for help, would help him contact friends and an attorney, it might even send a consular representative to the deportation hearing....affidavits from various family members and legal and social service groups stated that had they known of the appellant's difficulties they would have been of assistance to him.
>
> We conclude that these affidavits made a prima facia showing of prejudice....the appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have lead not merely to appointment of counsel, but also to community assistance in creating a more favorable record

> to present to the immigration judge on the question of deportation. The appellate did show some likelihood that had regulation 8 CFR § 242-2(e)(1979), a 'regulation intended to insure compliance with Vienna Convention on consular relations' had been followed his defense and the conduct of the hearing would have been materially affected.

Id. at 531.

The only significant difference between Rangel-Gonzalez and this case is, of course, that this case is a matter of life and death. "Because sentences of death are 'qualitatively different' from prison sentences, the Supreme Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, supra, 455 U.S. at 117-118 (citation omitted); See also, Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Because of that difference, a correspondingly different need exists for heightened reliability in the sentencing process. Ake v. Oklahoma, 470 U.S. 68, 87 (1985); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). A state has a constitutional obligation to "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The Supreme Court has repeatedly condemned sentencing procedures that inject unreliability in the jury deliberations in capital cases. See, e.g., South Carolina v. Gathers, 490 U.S. 805 (1989); Johnson v. Mississippi, 486 U.S. 578 (1988); Caldwell v. Mississippi, 472

U.S. 320 (1985); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

This violation of international law by the Arizona authorities, and the resulting depravation of aid and testimony from his government have denied Mr. LaGrand rights considered fundamental in his home country and in ours. Our constitution calls out for the correction of these harms whenever they occur.

4. The Trial Judge's Denial of Petitioner's Motion for New Counsel or to Substitute Counsel, Violated his Rights Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Trial Court also Erred in Failing to Conduct a Meaningful Hearing on That Motion.

On December 14, 1983 which was approximately 45 days before the start of his trial, Petitioner filed a pro se motion to remove his attorney of record, David Gerson. The motion was entitled "Declaration of Conflict of Interest between Attorney and Client". On January 4, 1984, the Petitioner requested legal assistance from another attorney and that other attorney be substituted as counsel of record. See R. pp. 451-452. However, it was not until January 30, 1984, the day before the trial, that the court conducted an ersatz hearing on the Petitioner's motion. This hearing was prompted by Mr. Gerson's oral motion to withdraw as counsel for Karl LaGrand which was predicated upon the pro se motion seeking his removal. T. 1/30/84, pp. 51-52.

Mr. Gerson stated that "we've had some disagreement, I guess, as to how the case should be pursued." Mr. Gerson also stated "this also was based upon reasons which have been previously discussed with the court." T. 1/30/84, pp. 51-52. There is no indication in the record of what this meant. The court then had a discussion directly with Karl LaGrand who stressed that Mr. Gerson told him: "That I was going to get found guilty no matter what. I didn't stand a chance and there was no way I could get a plea bargain because of public pressure, and I feel there's a lack of interest on Mr. Gerson's part, and I just ask the court that I be represented with a new counsel." Id. at 52. Moments later, Karl LaGrand indicated that: "I felt there should have been a lot more done than he was doing and I sent the letter to him and a copy to the court asking that he ask the court to withdraw from the case and appoint new counsel, which I never heard nothing until today." Id at 55. The court asked Mr. LaGrand if he thought his counsel was prepared to proceed with the trial and Mr. LaGrand replied: "I don't think so." Id. at 55. The court questions the Petitioner specifically about David Gerson's performance. The Petitioner attempted to answer the question. However, his answers would have probably involved revealing attorney/client statements. The court responded:

> Don't tell me what you told him because that's not my business and I'm not entitled to know that.
>
> * * *
>
> No, I just -- I don't want to hear about your conversation.
>
> * * *
>
> Yes, please don't tell me specifically what your conversations were.

Id. at 57 and 58.

In trying to determine whether there were certain areas which Karl LaGrand had requested that Mr. Gerson pursue, the following colloquia ensued between the court and the Petitioner:

> **Court:** Is there anything about the case you think that he ought to know that he has not asked you about, whether it has anything to do with guilt or innocence or continuances or anything?
>
> **Karl LaGrand:** Yes, there are some things that we discussed. I feel I should not bring them up right now.
>
> **Court:** I don't want to know confidential things you have discussed with one another.

Id. at 58-59

It is fundamental that an accused charged with felony violations has a right to the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); State v. Hein, 138 Ariz. 360, 674 P.2d 358 (1983). Implicit in this guarantee is the right to be represented by effective counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Moreover, the trial judge has a duty to see that the trial is conducted with solicitude for the essential rights of the accused. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942).

When the trial court received Petitioner's motion challenging the effectiveness of his counsel, it should have had a meaningful and immediate hearing on that motion. Petitioner, Karl LaGrand, was uneducated, inexperienced in the law, almost twenty years old and preparing for a trial in a little over a month in which his death would be asked for. The court did not conduct a hearing until the eve of trial, almost six weeks after the motion was filed. While the trial court did attempt to conduct an inquiry, it found itself on the horns of a dilemma. The court repeatedly cautioned the Petitioner not to reveal conversations that occurred between himself and Mr. Gerson. However, by precluding substantive testimony in that sense, the court prevented a meaningful inquiry into the issue of whether Mr. Gerson was rendering effective assistance of counsel. Although the court was correct in cautioning the defendant not to relate privileged communications, the court did have other options available to it. The court should have appointed temporary counsel to discuss the matter with the defendant and reached a decision whether privileged communications should be presented to the court in camera to aid a motion to remove Mr. Gerson. In this regard, there was no doubt that Mr. Gerson was not acting as the defendant's attorney. In United States v. Barnes, 662 F.2d 777 (D.C. Cir. 1980), the court recognized that one cannot reasonably expect an attorney to vigorously advocate his own prior representation of a client as being ineffective. Quoting from United States v. Hert, 543 F.2d 162 (D.C. Cir. 1976) the court stated:

> We have no doubt that the conflict corrupts the attorney/client relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.

662 F.2d at 782.

Additionally, in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 49 L.Ed.2d 564 (1975), the court said:

> An unwanted counsel 'represents' the defendant only though a tenuous and unacceptable legal

> fiction unless the accused has acquiesced in such representation the defense presented is not the defense guaranteed him by the constitution for in a very real sense it is not his defense.

95 S.Ct. at 2534.

It is clear therefore, that Karl LaGrand was without counsel at the time the court undertook to decide to motion to withdraw filed by Mr. Gerson.

The court has certain obligations at that point. The chief obligation was to see that Mr. LaGrand had counsel at this critical stage of the proceeding in conformance with his rights under the sixth amendment. The appointment of independent counsel would have resolved the dilemma facing the court. That counsel could have fully discussed the nature of Mr. LaGrand's complaints of the ineffectiveness of his attorney and made a well reasoned decision as to whether the privilege should have been waived and those conversations made part of the motion. Instead, the court elected to have Mr. LaGrand represent himself at this critical proceeding. It is submitted that the defendant was denied assistance of counsel in violation of Gideon v. Wainwright and United States v. Cronic, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) where the court said:

> ...A trial is unfair if the accused is denied counsel at a critical stage of his trial.

104 S.Ct. at 2047. Therefore, the trial judge's denial of the Petitioner's motion was error.

The Arizona Supreme Court found that the trial court's refusal to appoint or substitute new counsel was properly denied. State v. LaGrand, 152 Ariz. at 487. The court's decision that the refusal to substitute counsel was not an abuse of discretion was based on mistakes and misperceptions about the dynamics in the case around this issue. The Supreme Court commented that:

> The trial had already been postponed numerous times and by the time of the motion nearly two years had passed...and counsel had already been changed once. No real conflict between the appellant and counsel was discernable from the record. It simply appears that appellant would have been happier with other counsel...

152 Ariz. at 483.

The Arizona Supreme Court insinuates in this excerpt from its opinion that Mr. LaGrand was simply shopping for a new lawyer because he was not happy. In point of fact, Petitioner's first counsel, Thomas Higgins, tried to withdrew because of trial conflicts on May 16, 1983.[25] Karl LaGrand had no complaints or conflicts with Thomas Higgins. Less than seven months after Mr. Gerson took over the case, Petitioner asked the court to replace Mr. Gerson. Similarly, it is not accurate to claim as the Arizona Supreme Court did, that the Petitioner waited for two years before bringing his motion for substitution of counsel only to delay the trial. Again, in point of fact, the Petitioner only visited with

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[25] Curiously, Mr. Higgins was not allowed to withdraw from the case. Mr. Gerson was appointed as "associate" counsel and there was a colloquia between Mr. Higgins and the court in which Mr. Higgins stated that he would be happy to advise Mr. Gerson with any questions that he had. The trial court, therefore, knew that Mr. Gerson was inexperienced and would need help. As Mr. Higgins affidavit states, he was never called on by David Gerson for any help after Mr. Gerson took over the case. Exhibit C.

Mr. Gerson on very few occasions and had very few telephone conversations with Mr. Gerson in the less than seven months that he was actually counsel of record. Finally, the Supreme Court indicated that it could discern no real conflict between the appellant and counsel. This of course is directly related to the fact that the trial court (properly) advised Mr. LaGrand not to disclose details of his relationship with Mr. Gerson or conversations with Mr. Gerson in open court. Unfortunately, this had the effect of blocking any ability to articulate any genuine reasons he may have had for requesting new counsel. Therefore, since the travaman of this case is the performance (or lack thereof) of Petitioner's counsel, this court should find that the Constitution of the United States required more of the trial judge and the appellate review than was done and the actions of the trial judge and their confirmation by the Arizona Supreme Court was error.

C. Trial Issues

1. The trial court erroneously denied the Petitioner's submitted instruction on intoxication

At the trial, the Petitioner's trial counsel, David Gerson, submitted the standard instruction on intoxication, but the trial judge refused to so instruct the jury.

In Arizona, a defendant is entitled to an instruction on any theory of the case which is reasonably supported by the evidence. State v. Schumway, 137 Ariz. 585, 672 P.2d 929 (1983). More importantly, A.R.S. § 13-503 defines the effect of intoxication and provides that the jury may take into consideration the fact that a defendant was intoxicated at the time of the crime in order to determine the appropriate culpable mental state.

Culpable mental states

The trial court instructed the jury on a variety of possible verdicts, including both forms of first degree murder, i.e., felony murder and premeditated murder, as well as second degree murder. Exhibit T. With respect to the charge of premeditated murder, several culpable mental states were at issue. Premeditation was defined in A.R.S. § 13-1101 and required that the showing that the defendant acted with the intention or with the knowledge that he will kill another human being. Both of these culpable mental states are defined in A.R.S. § 13-105(a)(b) respectively.

Additionally, evidence was admitted during the trial showing that approximately a day or two before the homicide, Karl LaGrand and Karen Libby (an acquaintance with whom Karl LaGrand was living at the time of the crime) took "acid". In fact, they had "tripped together on a few occasions" prior to the homicide. T. 2/9/84, pp. 1014-1015. Additionally, on the evening prior to the homicide, January 6, 1982, Karl and Walter LaGrand partied together with Ms. Libby consuming beer, whiskey and marijuana. The trial court found that there was not enough evidence to justify giving the jury the intoxication instruction. This was confirmed by the Supreme Court. State v. LaGrand, 152 Ariz. 483, 487, 733 P.2d 1066 (1987).

Since the proof of premeditated murder requires proof that a defendant acted intentionally and knowingly, both of which are defined culpable mental states, the jury should have been able to determine the appropriate culpable mental state in order to properly determine whether the defendant was guilty of first degree, premeditated murder. The trial court's refusal to give that instruction, particularly in light of the admission of the evidence concerning intoxication, and the Arizona Supreme Court's affirmation of that decision was error. This is especially so in light of the fact that the jury returned a verdict of first degree murder, **without specifying whether it found premeditation or felony murder.** Given this ambiguity, the mental state of the Petitioner and evidence thereon was crucial. To have not allowed the jury to examine the mental state with regard to intoxication was error.

2. The trial court erred in restricting the Petitioner's right to a lesser included offense instruction. The Petitioner contends that Arizona's felony murder statute unconstitutionally restricts his right to due process and a fair jury trial because it has been construed to prohibit a lesser included instruction regrading second degree murder

We acknowledge that the United States Supreme Court has ruled against this argument in a 5-4 decision, Schad v. Arizona, 115 L.Ed.2d 555 (1991). However, since it was a 5-4 decision, following Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991), we are raising it in this petition to preserve the issue.

Both prior to trial and at the time the court prepared instructions for the jury, the Petitioner contended that Arizona's felony murder statute unconstitutionally restricted his right to due process and a fair jury trial.

Prior to trial, the appellant filed a motion seeking the have Arizona's felony murder statute, A.R.S. § 13 1105 (A)(2) declared unconstitutional in so far as it had been construed to absolutely prohibit a lesser included instruction regarding second degree murder. R. pp. 285-287. Raised in another context, the Petitioner objected to the court's instructions on first and second degree murder in that they precluded the jury from considering second degree murder as a lesser included offense of felony murder. On this latter subject, the Petitioner offered an instruction which permitted the jury to consider the lesser included offense of second degree murder both as to premeditated first degree murder and as to felony murder. R. p. 611. The court, over the Petitioner's objection, inserted the phrase "premeditated" in various places within the Petitioner's requested instruction on the subject and thereby materially altered its meaning. Id. The Petitioner's counsel objected to this modification of the Petitioner's requested instruction. T. 2/17/84, pp. 1272-1273. After the Petitioner was convicted of first degree murder, these issues were again raised in a motion for new trial, R. pp. 673-677; 684-692, and in a post-conviction motion to vacate the Petitioner's judgment of conviction. See supplemental record on appeal, May 6, 1985.

(a) Felony murder statute is unconstitutional

The Petitioner maintains that because of the errors described above, he was denied due process and the right to a fair trial. In the present case, the matter went to the jury on both premeditated murder and felony murder theories. The penalty for both forms of murder is set forth in A.R.S. § 13-703. There are but two choices:

the sentence of death or the sentence of life imprisonment without the possibility of parole until a defendant has served 25 calendar years. However, unlike felony murder, the law with respect to premeditated murder permits the jury to convict on a lesser included offense, provided the facts support a lesser included instruction.

A.R.S. § 13-1105 is intended to identify and punish one class of felony: individuals who commit first degree murder. While it is clearly within the prerogative and power of the state to punish the crime of murder, when the state endeavors to punish by means of the death penalty, the crime and its punishment becomes unique, both in severity and in finality. *Gardner v. Florida*, 430 U.S. 349 (1977). The trial court's interpretation of the two provisions of the first degree murder statute has the unconstitutional effect of permitting some members of the class of felonies to escape the death penalty through the availability of lesser included offenses. See, A.R.S. § 13-1105 (A)(2). Given this interpretation, the statute is unconstitutional. Arizona's courts permit lesser included offense instructions whenever the evidence would justify the lesser charge in a premeditation case, but not when the crime is charged as a felony murder. *Compare*, *State v. Dalgoish*, 131 Ariz. 133, 139, 639 P.2d 323, 329 (1982) *with* *State v. Celaya*, 135 Ariz. 248, 256, 66 P.2d 849, 857 (1933). Given the strictures of the eighth and fourteenth amendments as interpreted by the United State Supreme Court, the class of first degree murders are exposed to punishment in impermissibly different ways. Depending on the manner in which the State of Arizona chooses to charge a first degree murderer, the state is granted too much discretion in determining the degree to which a given felon will be exposed to the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). Not only does this offend the fourteenth amendment's equal protection strictures, it also offends standards of fundamental fairness.

The inability of defendants charged with felony murder to obtain a lesser included instruction under any circumstances constitutes a violation of the fourteenth amendment to the United States Constitution. In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court specifically held that the death penalty may not be constitutionally imposed after a jury verdict of guilt in a capital case where, when the facts warrant it, the jury in not permitted to consider a verdict of guilt on a lesser included offense. This is so because the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction. Beck v. Alabama, supra. Trial courts should be constitutionally prohibited from withdrawing this option from the jury when the facts warrant a lesser included instruction in a felony murder case. See also, Spaziano v. Florida, 82 L.Ed.2d 340 (1984).

(b) The trial court erred in its instructions

In addition to being convicted under an unconstitutional statute, the Petitioner was convicted as a result of trial error in the instruction of the jury regarding the subject of a lesser included instruction. Exhibit T. Prior to, during and after trial, relying on the state of the evidence, the Petitioner had insisted that if his case went to the jury under Arizona's felony murder rule, he was entitled to a lesser included instruction with respect to second degree murder. The record indicates that the trial court felt that the facts warranted a second degree murder instruction, since one was given. However, over the objections of the Petitioner, the court refused to instruct the jury of a lesser degree of homicide with respect to the felony murder instructions. Exhibit T.

Beck v. Alabama, supra, held that, on the facts of that case, when the jury was not permitted to consider a verdict of guilt regarding a lesser included offense which the evidence supported, the failure to give the jury the third option of convicting on a lesser included offense inevitably and impermissible enhanced the risk of unwarranted conviction. Subsequently, in Spaziano v. Florida, supra, the United States Supreme Court clarified and in some respects expanded its holding in Beck v. Alabama, the Spaziano decision clearly indicates that Beck v. Alabama, supra, is not a holding which was limited to the facts of that case, but that Beck was rather intended to set broad new guidelines for the submission of death penalty cases to a jury. Spaziano, supra, held generally that the risk of an unwarranted conviction which is created with the jury is deprived of the third option of convicting on a lesser included offense is a violation of a defendant's constitutional right to a fair trial.

D. Sentencing Issues

1. Trial counsel failed to develop and present the Petitioner's age, chronologically as well as his maturity and past experiences as sufficient mitigation

Age is specifically delineated in A.R.S. § 13-703 (G)(5), Exhibit U, as a mitigating factor which should be weighed by the court. Thus, the age of any defendant in a mitigation hearing should be of paramount importance to a defendant's counsel at the sentencing stage. This is also true at the guilt phase.

When the crime was committed in January, 1982, the Petitioner was barely eighteen years old. The affidavit of Dr. Derning, Exhibit I, explicates and demonstrates Karl LaGrand's stunted psychological maturity. Given trial counsel's very, very minimal efforts in developing Karl LaGrand's age as a mitigating issue, even beginning at the trial level, it is not surprising that Judge Hannah found "it really isn't much of a factor..." T. January 14, 1984. Both the trial counsel and the sentencing judge's treatment of Karl LaGrand's age was superficial and constitutionally erroneous. In State v. Gerlaugh, 144 Ariz. 499, 698 P.2d 694 (1985), the Arizona Supreme Court relied on Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The Arizona Supreme Court stated:

> Age is entitled **great weight** as a mitigating circumstance, especially if the defendant is a minor.

144 Ariz. at 461 (emphasis added).

Also in State v. Valencia, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) where the court stated: "Age is a substantial and relevant factor which must be given great weight." However, the

Supreme Court of Arizona has refused to find age is a mitigating circumstance in other cases. State v. Walton, 159 Ariz. 571, 589, 769 P.2d 1017 (1989) (age twenty not a mitigating factor); State v. Gerlaugh, supra (age nineteen not a mitigating factor); State v. Claiborne, 142 Ariz. 335, 348, 690 P.2d 54, 67 (1984) (age twenty not a mitigating factor); State v. Gillies (Gillies I), 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (age twenty not a mitigating factor). The court did find in State v. Valencia, supra, that age sixteen was a mitigating factor. In State v. Gerlaugh, supra, defendant was nineteen and a half, the court indicated that the Petitioner was adjudged mature by the trial judge. Initially, the Arizona Supreme Court in Gerlaugh found that the fact that the crime was not a hasty or an impulsive act, but involved considerable thought and cruelty; thus, the defendant's age was not a mitigating factor. 144 Ariz. at 449.

In Arizona, with regard to age as a mitigating factor, the courts will look at the maturity, the impulsivity of the crime, and the chronological age of the defendant below nineteen. These factors should have been developed by trial counsel and presented to the court from the very beginning of the trial.

Also trial counsel had access to the previous psychological evaluations and age related evaluations of Karl LaGrand and he failed to bring those to the attention of the court. For instance, in a psychological report by Gene F. Chambers, Ph.D. in April, 1978 when Karl LaGrand was fourteen years old, he was diagnosed as "severely emotionally handicapped." See Exhibit N. None of this testimony was presented to the court directly and certainly not in an effective, persuasive presentation. The sentencing report demonstrates that the information supplied by trial counsel both through the MMPI analysis of Dr. Hertz, See Exhibit O ,and the testimony of Dr. Meshorer, T. 12/14/84, as well as Dr. Meshorer's inadequate report Exhibit A, Exhibit attached to Habeas, were clearly inadequately presented.

Since the trial court in the instant case found that age was not much of a factor, it is the same mistake made by the trial judge in Eddings, supra. In Eddings, the Supreme Court said:

> The trial judge recognized that youth must be considered a relevant mitigation factor. But youth in more than a chronological fact, it is a time and condition applied for the person may be most susceptible to influence and to psychological damage.

102 S.Ct. at 869.

The record in Eddings, was replete with the same type of information which should have been supplied to the trial court by trial counsel and which is attached to this Petition as Exhibit N, O, and which formed the basis for Dr. Derning's opinions with regard to Petitioner's mental state and his maturity.

Therefore, in light of trial counsel's failure to adequately develop and present age as a mitigating factor and the trial judge's failure to adequately consider age as a mitigating factor, Karl LaGrand should have a new hearing to determine the weight to be given to this mitigating factor.

2. The statutory mitigating factor of age is vague under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

A.R.S. § 13-703(G)(5) includes the statutory mitigating factor of age. There is no guidance provided within the statute to instruct the sentencer as to how and when a defendant's age should be weighed against a finding of aggravating factors.

It is improper and violates the Petitioner's constitutional rights if the sentencer weighs aggravating and mitigating circumstances that are overly vague or otherwise invalid. *Socher v. Florida*, 504 U.S. ___, 122 S.Ct. 2114 (1992). *See also*, *Stringer v. Black*, 503 U.S. ____, 177 L.Ed.2d 367 (1992).

In the present case, the Petitioner at the time of the crime was eighteen years and three months. At the time of sentencing, he was only twenty years old. Even though the age was presented to the trial court at the sentencing hearing, the trial court found it was not sufficient to outweigh the aggravating factors that he had found.

Neither case law nor statutory law in Arizona provide guidance to the sentencing judge as to why and how age should be considered as a mitigating factor. This failure to properly educate the sentencer violates the Petitioner's rights under the eighth and fourteenth amendments to the United States Constitution.

3. Statutory and Non-statutory mitigating evidence was not fully considered by the trial court at sentencing and therefore the sentence of death cannot stand

The record in this case reflects that mitigating evidence was not fully considered at the trial level or by the Arizona Supreme Court. The Ninth Circuit Court of Appeals in *Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992) held that where there is a risk that mitigating evidence was not fully considered a sentence of death cannot stand.

In *Jeffers*, the Ninth Circuit held that the Arizona Courts failed to consider *adequately* certain mitigating evidence advanced by Jeffers. Although the Arizona Supreme Court considered the evidence that Jeffers was a heroin addict and was under the influence of alcohol and heroin at the time of the murder pursuant to the statutory mitigating circumstance A.R.S. § 13-703 (G)(1), it rejected that circumstance and then the court failed to consider the evidence as a non-statutory mitigating circumstance. *See*, *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990) (holding that Montana courts erred by rejecting mitigating evidence of a mental impairment simply because it did not rise to a level substantial enough to satisfy the wording of Montana's statutory mitigating circumstances).

Also, the sentencing court determined that Jeffers' evidence of his emotional love-hate relationship with the victim and the evidence that she provoked, the attack also did not satisfy the statutory mitigating circumstance of "unusual and substantial duress" and the State Supreme Court affirmed. The court failed, however, to go on to consider whether the evidence was sufficient to establish a non-statutory mitigating circumstance. Further, the court failed to discuss the evidence that Jeffers continued to deny involvement in the murder when he spoke with a psychiatrist under the influence of sodium amytal. The court stated, "because there is a risk that mitigating evidence in this case was not fully considered, Jeffers' sentence of death cannot stand.

In the present case neither the trial court nor the Arizona Supreme Court were in a position to adequately consider all of the mitigating evidence -- statutory or non-statutory -- because the evidence, though readily available was not fully and completely presented at the penalty trial. The court found the following:

> As to both defendants, the court finds none of the mitigating circumstances enumerated in subparagraphs 1 through 4 of A.R.S. § 13-703 (G).
>
> The court has considered in mitigation as to both defendants their ages and their unhappy and disruptive childhoods and family lives, the lack of a male role model, their expressed remorse, both expressed here today and in the letters they have sent to the court, and the psychiatric and psychological evidence offered on their behalf and the other evidence which was presented at the mitigation hearing, both documentary and oral.
>
> As to each defendant the court finds there are no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors.

(See Minute Entry dated December 12, 1983, pp. 3-4, R. p. 806).

A.R.S. § 13-703 (G) outlines five mitigating circumstances which, by statute, are relevant in determining whether to impose a sentence less than death. This statute indicates clearly that mitigating evidence is not limited to the five enumerated factors. Those factors are:

> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

As indicated above, the trial court in this particular case found that mitigating factors 1 through 4 were not present; however, with the additional information that is provided through the investigation that was entertained in order to prepare the Petition for Habeas evidence was available and should have been presented to the court and the court was at least to some extent put on notice that the additional information was there, to consider mitigating circumstance (1), (2) and (4).

There was clearly enough evidence to present a defense of impulsivity that would have countered a finding of guilt on the murder one charge; however, even if the evidence was not enough to present a full defense, there certainly was evidence that should have been considered at the time of mitigation.

Upon exposing the mental state of Karl LaGrand and his prior problems with uncontrollable conduct under extreme stress, he could not have had the capacity to appreciate what he was doing at the time that the crime occurred. As Karl explained in his confession, "I wasn't me". If the mental health experts had been provided with all of the prior reports available as well as given ample time to interview the Petitioner, they would have been able to testify regarding the fact that Karl LaGrand was out of control. Dr. Derning's affidavit, Exhibit I, establishes a character trait of Karl's that makes him act without reflection and therefore it tends to establish that Karl LaGrand acted impulsively.

Even more important, the trial judge originally ruled Karl LaGrand's confession to be involuntary. Then trial counsel stipulated that it was a violation of Miranda, but not involuntary. During trial the Petitioner's co-defendant requested that it be considered in his case-in-chief. The trial judge again ruled it unreliable.

The Petitioner then requested to submit the confession during the mitigation trial. Based on the court's prior rulings and his decision that the statutory mitigation factor of A.R.S. § 13-703(G)(1) did not exist, it is fair to assume that he did not give adequate weight to this mitigating evidence. Exhibits W and Z.

At the time of sentencing, impulsivity was generally referred to in the remarks made by trial counsel for the Petitioner, but no evidence or expert testimony was presented to support the conclusions of trial counsel. Therefore, the court could not have adequately considered this vital testimony.

The second statutory factor was also present. From the confessions, which the court heard and was aware of, the court was put on notice of the Petitioner's duress under the circumstances and the scenario in the bank on the morning of the robbery. It is clear that the Petitioner panicked because of the stressful situation and reacted based on uncontrollable urges. The Petitioner was suffering from duress even though, apparently, not enough to constitute a defense to the prosecution.

The Petitioner in this case also went out of his way to avoid causing a grave risk to anyone while the robbery was occurring. He purposely took a fake gun so that no one would get hurt. He purposely decided to rob a bank because he felt that since the money was federally insured and did not belong to the individual that he was taking it from, that they would not fight.

The Petitioner asserted immediately after his arrest that he did not intend to harm anyone when he entered the bank "I did everything I thought was necessary, that no one would get hurt, whether in the bank, myself or my brother. That was the main goal. Other than getting the money and getting away. I'm no killer. 'Cuz I knew if I brought a real gun someone could get killed, and no way was I going to take that chance."

Karl not only used a toy gun in the commission of the bank robbery, but he also tried to minimize challenges. He felt that he would use finesse and bluff his way with the toy gun rather than risk the fact that someone would get shot. He felt also that if the bank employees realized that they were in no danger that they would be much less inclined to confront or to attack him or his brother. He tried to calm people when they appeared to panic and to keep the situation in control. He tried to calm Dawn down when she was getting hysterical.

He obviously had thought about the risks that could occur in this type of crime and he went out of his way to avoid those risks and to assure that no one would get hurt. It was only because of the extreme duress and stress that he broke and his uncontrollable, impulsive acts occurred causing the death of the victim and the assault on the bank teller.

As indicated in a prior argument, the defendant's age is also a strong mitigating circumstance and should not have been taken as lightly as the court considered it in this matter. See Argument D (1).

Even if the evidence that was presented was not enough to meet the statutory mitigating circumstances, the court was put on notice of its existence and should have considered it as non-statutory relevant, material mitigating evidence under Jeffers. The trial court failed to do that and therefore the weighing process violated the Petitioner's constitutional rights.

In reviewing the trial court's actions, the Arizona Supreme Court was limited to the record that was before them. Again, there was only a brief discussion of impulsivity during trial counsel's closing statements to the jury during the guilt phase and in his statements to the trial court at the penalty phase. No evidence was ever admitted, nor any expert testimony taken or psychological reports admitted to establish these mitigating factors so that the court could adequately use them in weighing the mitigation versus the aggravating factors that were found. Dr. Derning's affidavit, Exhibit I, further opines that the Petitioner was subjected to numerous experiences of neglect, verbal abuse, emotional depravation, parental indifference and apathy and psychological abuse as he was growing up. This affidavit provides numerous examples of the dysfunctional family that Karl LaGrand was raised in and supports a finding of a mitigating factor that is significant and substantial. The affidavit page 9 sets forth examples of prior evaluations and reports pertaining to Karl LaGrand and his family that support this finding. These reports were readily available and could have been presented and should have been presented to the trial court.

The affidavit further opines that Karl LaGrand was traumatized by the abuse he experienced as a child growing up in the LaGrand household. These traumatic experiences decimated the normal course of his psychological development and resulted in serious psychological impairments and symptoms. The trial court in the present matter did not adequately consider this type of psychological impairment at the time of sentencing. The impairment was documented throughout the Petitioner's childhood and adolescence by professionals who had assessed him over the years.

Dr. Derning further opines that as a result of being a victim of violence, the Petitioner finds his own violence unacceptable and therefore it is kept from conscious awareness. When the Petitioner explodes into a violent rage, he cannot identify the antecedent conditions, nor can he predict its occurrence, nor does he exert conscious volition over his actions. At the bank when he finally broke, he was out of control and could not handle the situation. His responses were separate from his conscious experience of himself. As Karl stated "I wasn't me".

Dr. Derning further opines that what occurred at the bank after Karl became threatened and panicked was totally unexpected especially since Karl LaGrand had attempted to minimize any risk of danger to anyone. His actions were totally opposite his conscious intent.

The trial court in this matter considered just the tip of the iceberg when looking at the dysfunctional family, the abuse and the psychological impairment that is present in this case. If the court had adequately considered all of the mitigating evidence that was available and properly weighed it against the aggravating factors, the imposition of the death penalty would not have occurred in this case.

This violated the Petitioner's constitutional rights under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

When all of the mitigating circumstances established by the record in this case are considered together, more than sufficient mitigation exists to outweigh the aggravating circumstances held to mandate the Petitioner's death penalty. The sentencing court failed to consider, as discussed above, the mitigating circumstances together as a whole.

In State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1985), the Arizona Supreme Court stated that mitigating circumstances will be considered individually and "in combination". The finding of no mitigating factors sufficient to outweigh the aggravating factors was an abuse of the trial court's discretion in this case. See also, Mills v. Maryland, 486 U.S.367 (1988).

Similarly in Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991), a non-capital case, the Fifth Circuit held that in federal habeas court review the court may apply "cumulative error" analysis in review of state proceedings. That court went on to hold that due process in violated when errors, taken together, result in a fundamentally unfair trial.

In the present case, the failure to consider all of the mitigating evidence coupled with the other argument presented on this review require a finding of violation of due process.

4. The trial court improperly failed to find the Petitioner's mental and emotional problems, abused childhood and impulsive behavior as sufficient mitigating circumstances to outweigh the aggravating circumstances. This violated the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that by not permitting consideration as a mitigating circumstance, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis less than death is a constitutional violation. In Jeffers v. Lewis, supra, the Ninth Circuit Court of Appeals appears to acknowledge, at least for that case, such a violation by the Arizona Supreme Court.

The Lockett court went on to hold that death penalty schemes must allow consideration "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". (emphasis added). Supra.

In the present case, at sentencing, the court had two experts' reports that concluded that the Petitioner's conduct at the time of the crime was impulsive and without premeditation. Notwithstanding this evidence, the trial court failed to find the Petitioner's impulsive conduct, inability to premeditate, emotional problems and troubled and abused childhood as sufficient mitigating circumstances to outweigh the aggravating circumstances. Instead, the trial court sentenced the Petitioner to death for a crime he committed at age eighteen, a crime he did not intend to commit and a crime for which he suffered great remorse.

There is no indication in the record that the trial court ever even considered impulsivity as a mitigating factor which is a violation of Lockett.

In the Minute Entry dated December 14, 1984, R. 806, the trial court explained that it had considered as mitigation the defendants' ages, their unhappy and disrupted childhoods and family lives, the lack of a male role model, their expressed remorse, and the psychiatric and psychological evidence offered on their behalf.

The court then went on to find that there were no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors. At no time did the court indicate that it had considered the Petitioner's emotional state at the time of the crime and the fact that he had an undisputed character trait that when he's under extreme stress results in his acting strictly on impulse and in an uncontrollable manner. As indicated in the above argument the trial court's rulings regarding the confessions leads one to assume that the court did not consider this mitigating evidence. This is a clear violation of Lockett, supra.

When this mitigating factor, regarding the Petitioner's capacity, is added to the ones that the court considered, the mitigating factors become "substantial" and would have, if properly weighed, been able to call for leniency even with the finding of the three aggravating factors.

5. Application of the death penalty to the facts of this case constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

The mitigating factor of cruel, heinous or depraved has been defined or applied in the manner that requires the state to distinguish the few cases in which the death penalty is warranted from the many in which it is not. Godfrey v. Georgia, 446 U.S. 426, 427 (1980). A person of ordinary sensibility could find that almost every murder fits this stated category. The Arizona Supreme Court has arbitrarily applied this aggravating circumstance to a variety of factual situations.

Application of this aggravating circumstance to the

Petitioner's case is not appropriate. See, Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), cert granted, 110 S.Ct. 232. To find a crime especially cruel, the court must find beyond a reasonable doubt that the victim was conscious and able to suffer physical pain and mental anguish. Id. Here, the Supreme Court only assumed there was some physical torment before death. See, State v. Walter LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). Also see, Exhibit D attached to Petition for Habeas. No evidence in the record established this factor beyond a reasonable doubt. No evidence established beyond a reasonable doubt that the Petitioner intended in inflict gratuitous violence upon the victim, that he committed the crime with relish or that he intended to inflict suffering. In fact, the evidence presented was that he never intended to harm anyone and that the actual act was totally impulsive and out of his control. See Exhibits I.

The trial court also found that the crime was heinous and depraved. Both of those factors go the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Lambright, 138 Ariz. 63, 75, 673 P.2d 1 (1983) cert. denied 469 U.S. 892 (1984). "A murder is especially heinous if it is cruel, hateful or shockingly evil." State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988) (quoting State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977). A murder is depraved if "marked by debasement, corruption, perversion or deterioration." Id.

In State v. Gretzler, 135 Ariz. 32, 659 P.2d at 1, the Arizona Supreme Court set forth factors which lead to a finding of heinous and depravity with examples of all but one. They were:

> 1. A relishing of the murder by the killer. See, State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) (defendant murdered four people and kept a expended bullet as a grizzly souvenir of his crime.); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980) (defendant killed the victim by repeated blows with hammer, tied him up, caused him to fall down a mine shaft, threw rocks on victim as he lay twitching, drove away saying, "Goodbye, Norman. I hope we never see you again.")
>
> 2. Gratuitous violence against the victim. See, State v. Cejay, 126 Ariz. 35, 612 P.2d 491 (1980) (defendant shot a female victim twice, dragged her into another room and shot her four more times in the head for no apparent reason; shot male victim three times and after he had fallen, shot him once more in the back and then kicked him repeatedly when he was unconscious or dead).
>
> 3. Needless mutilation of the victim. See, State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) (defendant strangled cell mate, then carved word "bonsai" into victim's back); State v. J.C. Smith, 131 Ariz. 29, 638 P.2d 696 (1981) (defendant mutilated female murder victim's breasts and genitalia).
>
> 4. Senselessness of the crime. See, State v. Tison, supra. (unnecessary murder of victims including two year old child, in no position to thwart murder's escape); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 459 U.S. 882 (1982) (defendant stabbed woman to death and then indiscriminately attacked her children attempting to stab and burn her to death).
>
> 5. Helplessness of the victim.

None of these factors are present in the Petitioner's case. The testimony at the trial indicated that the victim, could have died from any one of five stab wounds. There was no medical evidence that he suffered or that he did not die instantly.

Other more egregious cases have been found not to be heinous or depraved. For example, see, State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983) (the defendant repeatedly raped a murder victim and requested playing the tape "We are the Champions".); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (the defendant who shot the victim smiled and told the companion that the victim "squealed like a rabbit" when shot); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (the defendant shot the victim in his back, told the groaning victim, "Don't worry...it will be over soon" and shot him again. He then put the body in the victim's own van and abandoned it at the airport); Jeffers v. Ricketts, CA 6-1840 (November 9, 1987) (heinous or depraved finding unconstitutional as applied to the defendant despite evidence that the defendant strangled the victim when she was totally unable to resist, beat the dead victim about the face and reviled her, dragged her body to the shower stall where it remained for three days and then wrapped the body in garbage bags and buried it in a shallow grave in a remote area where wild animals unearthed and devoured the body.)

From the Supreme Court's opinion, it appears that the primary basis for this finding is the court's assumption that the victim did not die instantly, but "suffered some physical torment prior to dying". This conclusion, of course, eliminates any possibility that the victim's killers could have changed their minds. The Arizona Supreme Court's application of this aggravating circumstance to this case has the perverse effect of insuring more deaths, not fewer.

On its face and as applied to the Petitioner, the finding of a heinous, cruel or depraved aggravating circumstance violates the Petitioner's rights under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, and 15 of the Arizona Constitution.

6. The aggravating factor of pecuniary gain

(a) The application of Arizona's pecuniary gain aggravating circumstance to Petitioner's case violates the eighth amendment's prohibition of unreliable sentencing standards in capital cases

Both the trial Judge, Richard Hannah, and the Arizona Supreme Court violated the Petitioner's right to reliable sentencing standards guaranteed by the eighth and the fourteenth amendments to the United States Constitution.

Trial Court

In his findings at the sentencing, Judge Hannah stated the following in relation to the finding of pecuniary gain:

> As to Section 13-703 (F)(5) the Court finds beyond a reasonable doubt that both defendants committed the offense in the expectation of the receipt of something of monetary value. I'm utilizing the definition and analysis of this in the case of State vs. Hensley, sic a recent Arizona Supreme Court case, but my decision would be the same without this factor.

T. 12/14/84, p. 15.

The very case on which the Judge relied, State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984), articulated the definition of pecuniary gain, especially related to robberies. The court held that "an unexpected or accidental death that was not in itself during the course of or flight from a robbery, does not in itself provide a sufficient basis for finding (A.R.S. § 13-703 (F) (5))" 142 Ariz. at 403-604. In Hensley, the murders were "part of the overall scheme of the robbery with the specific purpose to facilitate the robbers sic escape." [26]

Similarly, in 1989 the Arizona Supreme Court further articulated the definition of pecuniary gain in *State v. Prince*, Ariz. 268, 772 P.2d 1121 (1989): "We have repeatedly held that to prove pecuniary gain, the state must show the actor anticipated receiving something of value as a result of the murder... the state must show beyond a reasonable doubt defendant's **purpose** for murdering the victim was the expectation of pecuniary gain." 160 Ariz. at 275, P.2d at 1128. This standard was not applied at the sentencing in the Petitioner's case by Judge Hannah. The evidence at the trial revealed that the robbery was over. The Petitioner and his brother were on their way out, and Karl LaGrand's impulsive acts were in response to Dawn Lopez's hysteria and to the kick by Ken Hartsock. See also, *State v. Watson*, 129 Ariz. 60, 629 P.2d 943 (19__). Judge Hannah's did not articulate adequately for the record why this factor was being invoked other than citing *Hensley*. Certainly, a close examination of the record discloses that the presence of pecuniary was not proved "beyond a reasonable doubt."

Appellate Review

The independent review of the record by the Arizona Supreme court also failed to apply the correct standards in the Petitioner's case. Although the Court articulated the standard in *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991,1010 (1984), *cert.*

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[26] The defendant had the three victims lie on the floor during the robbery and before leaving the bar shot each victim in turn with the intent that no witnesses be left to identify the robbers. The murders were not unexpected or accidental.

denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L.Ed.2d 864 (1985). See State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). The court noted that the Petitioner "may have reacted irrationally to the failure or inability of the victim to open the safe...", 153 Ariz. at 36, 734 P.2d at 578. The Court found that because the Petitioner was at the bank in an attempted robbery, and the fact that the killing occurred during the course of that attempt satisfied the requirements of A.R.S. § 13-703 (F)(5). Indeed, the court seems to articulate a new definition for pecuniary gain. The court stated: "When the defendant comes to rob, the defendant expects pecuniary gain and **this desire infects all other conduct of the defendant.**" (emphasis added) 153 Ariz. at 35, 734 P.2d at 577.[27] The Arizona Supreme Court therefore enunciated a new pecuniary gain standard, ie, robbery equals pecuniary gain. By misapplying the pecuniary gain standard, the Arizona Supreme Court violated the Petitioner's eighth and fourteenth Amendment rights.

A central tenet of eighth amendment is that capital punishment statutes must provide a "principled means ... to distinguish those that received the penalty from those that did not." Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). The United Supreme Court has explained that:

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[27] This language was also cited in one of the most recent cases involving the application of pecuniary gain, State v. Cook, 170 Ariz. 40 821, P.2d 731 (1991):

> "[In LaGrand] We held that the fact the defendant was in the bank to commit a robbery 'infect[ed] all other conduct." 170 Ariz. at 61.

> (t)his means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless (sentencing) discretion". Godfrey v. Georgia, 446 U.S. 420, 428, (1980), quoting Gregg v. Georgia, 428 U.S. 153, 196 (1976).

In Godfrey, the court reversed a death sentence because an aggravating circumstance in Georgia's death penalty statute had been unconstitutionally interpreted in that defendant's case.

The same result is required in the Petitioner's case. the Arizona Supreme Court in the instant case adopted a definition limiting the application of the aggravating circumstance of pecuniary gain in its death penalty statute. However, that same court chose not to apply that limiting definition in one case, Petitioner's. This cannot be squared with the state's constitutional obligation to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. 420, 428, quoting Gregg v. Georgia, 428 U.S. 153, 196 (1976); Profitt v. Florida, 428 U.S. 242, (1976); and Woodson v. North Carolina, 428 U.S. 280, (1976).

In Lewis v. Jeffers, 110 S.Ct. 3092 (1990), the Supreme Court adopted the "rational fact finder" test of Jackson v. Virginia, 443

U.S. 307 (1979) to appellate review of whether "a state court's finding of an aggravating circumstance in a particular case ... is arbitrary or capricious..." Jeffers, 110 S.Ct. at 3103. Relief is warranted when "no reasonable sentencer" could have concluded that the aggravating circumstance in question applied to that individual defendant. Id.

(b) In applying a broader definition of the aggravating factor of pecuniary gain, the Arizona Supreme Court has violated Petitioner's right to due process under the Fourteenth Amendment

The Arizona Supreme Court in its decisions in State v. Lagrand, 152 Ariz. 483, 733 P.2d 1066 (1987) and State v. Lagrand, 153 Ariz. 21, 734 P.2d 563 (1987), as indicated above, articulated a standard for pecuniary gain as an aggravating circumstance which was different in that it was broader than the definition existing at the time of the offense. The application of the broader standard and definition to the Petitioner constitutes an ex post facto enlargement of the penalty for murder motivated by pecuniary gain. Therefore his right to due process under the 14th Amendment was violated by that application because an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964). Because of this violation, the Petitioner's right to due process was violated and he should be granted a new sentencing.

7. Methods of Execution: The imposition of death by using lethal gas or lethal injection in Arizona is cruel and unusual punishment in violation of the eighth and fourteenth

amendments to the United States Constitution and Article II, §§ 1, 4, 15 and 24 of the Arizona Constitution

(a) Introduction

There are two methods provided by statute to execute in Arizona. The first is the use of lethal gas. Sodium cyanide pellets wrapped in cheese cloth are lowered into a mixture of sulfuric acid and distilled water. The chemical reaction produces hydrogen cyanide gas, the same gas -- know by its trade name zyklon B -- used by the Nazis to exterminate over a million men and women at Auschwitz-Berkenau.

Throughout the process, which can take over ten minutes, the Petitioner will experience excruciating pain. Initially, the pain will be similar to that of simultaneously suffering a stroke and a heart attack. The pain will spread throughout his body as its hunger for air produces uncontrollable and violent reactions. His body will reflexively produce a massive amount of adrenaline, which will further create a "pounding and rapid heartbeat, an increase in blood pressure, dilation of air passages, and a tightening of sphincters." The Petitioner will eventually suffocate, his heart will stop, and his brain will cease to function, but not before the state has subjected him to excruciating and inhuman pain. This is obviously a cruel method of execution. The use of this type of execution flaunts and violates the common standards of decency and violates the United States Constitution's prohibition against cruel and unusual punishment. Eighth amendment.

(b) Eyewitness accounts of lethal gas executions in Arizona confirm the unnecessary and wanton infliction of pain

The affidavit by James J. Belanger, a licensed attorney in Arizona, See Exhibit X, attests to the horrific death that was executed on Don Eugene Harding on April 6, 1992 in the Arizona state gas chamber. This affidavit supports the medical communities opinion that a prisoner suffers a torturous and lingering death. Since the United States Supreme Court's decision in Furman v. Georgia, supra. there have been seven lethal gas executions conducted. These executions prove that this barbaric method of execution inflicts unnecessary and extreme pain.

Donald Harding's execution here in Arizona on April 6, 1992, is but one horrible example. Donald Harding's execution was the first lethal gas execution in the state of Arizona since 1963, and because of the agonizing, torturous and dehumanizing manner by which Mr. Harding died, the state legislature adopted an alternative method of execution by fatal injection. It is up to the defendant to determine which method he would prefer to die by.

Two of the witnesses to Mr. Harding's death, Carla McClain and Donna Hamm, described that Mr. Harding immediately began to "moan and groan very loudly, loudly enough" for the witnesses to "hear through the extremely thick metal walls" of the gas chamber. It was like a "low guttural sound of shear torment". James J. Belanger See affidavit, Exhibit X, described the execution of Mr. Harding: "His face was red and contorted as if he attempting to fight through tremendous pain". For endless minutes, Mr. Harding gasped and choked as his body strained for oxygen. The agony that Mr. Harding experienced during the state imposed suffocation was obvious to all that witnessed the execution: Mr. Harding's "skin turned bright, bright red from face all the way through his chest and that's the capillaries of his circulatory system bursting inside his chest and blood filling his chest cavity there and he was almost a kind of a purple and his strained." Statement by Carla McClain. Another witness stated that "at this point, Don's body started convulsing violently and his arms stained against the straps. His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode." Belinger affidavit, Exhibit X.

After several minutes, Mr. Harding's head dropped to his chest, and horrified witnesses hoped and prayed that his suffering was over. But just as relief came over the witnesses, Mr. Harding raised his head, twitching and gasping. Mr. Harding's suffering did not end for several minutes. Most common, if not all, witnesses to Mr. Harding's execution, including Arizona's Attorney General, agreed that the state must switch to another form of execution to avoid the needless pain and suffering caused by lethal gas. Attorney General Woods stated that viewing the execution "solidified" his opinion the state should switch to lethal injection. Phoenix Gazette article, April 7, 1992.

The latest execution by gas was in California, shortly after Don Harding's execution. Robert Harris' death also confirmed the horrors of executing by lethal gas.

(c) Execution by lethal gas violates contemporary standards of decency

As shown above, death by lethal gas is brutal, agonizing and cruel. It is also unusual, given the infrequency of its use and the virtual unanimous abandonment of it and a method of execution. Thompson v. Oklahoma, 487 U.S. 815, 822, n.7 (plurality opinion).

Of the thirty-eight United States jurisdictions that have the death penalty, only three states -- Arizona, California and Maryland -- still execution by gas. Of these three, only two, Arizona and California, have had an execution since the 1976 Supreme Court decision in Gregg v. Georgia, 428 U.S. 153 (1976): Don Harding in Arizona and Robert Harris in California. Arizona has passed legislation to allow a defendant sentenced to be executed to pick his method of execution -- gas chamber or fatal injection. A poll taken in Arizona between March 26 and March 29, 1992 by the Arizona Republic, showed that 70% of the respondents believed lethal injection to be more humane. Interestingly, that was before Donald Harding's gruesome execution on April 6, 1992, which no doubt offers further support to the crusade to abolish torturous lethal gas executions in this state.

All other states that have utilized the gas chamber in the past have abandoned it in favor of more humane methods. In fact, use of the gas chamber as a method of execution is so aberrational that it must be considered unacceptable in our society. Of the approximately 20 legislatures who have adopted new methods of execution since Gregg, supra, not one has chosen lethal gas as a means of execution.

New Mexico was the first state to discard the gas chamber for lethal injection when it enacted its post-Furman capital punishment scheme in 1979. New Mexico Statutes Annotated § 31-14-11 (1991). The last man executed in the New Mexico gas chamber was David Cooper Nelson in January of 1960.

Following the violent execution of Jesse Bishop, lethal injection was adopted in Nevada in 1983. Nevada Revised Statutes Annotated § 176.355 (1991). Prior to Mr. Bishop's execution, no one had died in the Nevada gas chamber for 18 years.

Also in 1983, North Carolina amended their execution statute to give inmates the ability to choose whether to die in the gas chamber or by lethal injection. North Carolina General Statutes § 15-187. Not surprisingly, the four men and women who have since been executed have all consciously chosen to avoid the painful death inflicted by lethal gas.

After Jimmy Lee Gray's torturous execution of September 2, 1993, Mississippi abandoned the gas chamber in favor of lethal injection for those sentenced after July 1, 1984. Mississippi Code Annotated § 99-19-51. Prior to the execution of Jimmy Lee Gray, Mississippi had last used the gas chamber in 1964.

Wyoming also abandoned gas for lethal injection in June of 1984. Wyoming H.B. 175. The switch to lethal injection was embraced by law makers as a more humane means of execution. Prior to the change in the law, the last person to have been executed in the Wyoming gas chamber was Andrew Pixley in 1964.

Oregon also switched to lethal injection when it reenacted capital punishment in 1984. The last person to die by gas in Oregon in Lee Roy Stanford McGahuey on August 20, 1962.

In 1988, as Missouri readied to resume executions, the state abandoned the gas chamber in favor of lethal injection. Missouri H.B. 1340, 1348; Mo. R. S. § 546.720 (1990). Although the statute provides for death by lethal gas or lethal injection, the director of the Missouri Department of Corrections, Dick Moore, immediately announced his intention to use only lethal injection. In fact, all six persons who have been executed in Missouri since Furman have died by lethal injection. The last man executed in the Missouri gas chamber was Lloyd Leo Anderson on February 26, 1965.

Colorado's rejection of the gas chamber came in 1988 when they adopted lethal injection. Colo. Rev. Stat. 16-11-401 (1991). In a poll conducted in March of 1989, only 8% of the respondents thought the Colorado should utilize the gas chamber. The last man executed in the Colorado gas chamber was Louis Jose Monge on June 2, 1967.

The virtual unanimous rejection of lethal gas as an acceptable method of execution demonstrates that its continued use in Arizona is a violation of the evolving standards of decency.

In Enmund v. Florida, 458 U.S. 782 (1982), the court struck down as cruel and unusual the imposition of a death penalty on a participant in a felony who neither killed nor attempted to kill, and was not shown to have intended death. In determining that execution of Enmund would offend the constitutional prohibition against cruel and unusual punishment, the court emphasized that only eight jurisdictions authorize similar punishment. Id. at 792. Here, there are only three states that continue to use lethal gas.

Similarly, in Cocker v. Georgia, 433 U.S. 584 (1977), the United States Supreme Court declared cruel and unusual the infliction of the death penalty for the rape of an adult woman. In so deciding, the plurality found particular significance in the fact that as the states reenacted death penalty laws after Furman, only three provided for death for the crime of rape.[38]

The United States Supreme Court has found that the most reliable indication of a national consensus is the pattern of the laws enacted by the states. Stanford v. Kentucky, 439 U.S. 361, 373 (1989). The pattern of laws as to the methods of execution establishes irrefutably that the gas chamber has been rejected as an unnecessarily cruel and inhumane method of execution.

These legislative decisions to abandon the gas chamber find strong public support. Back in 1953, the American public strongly favored electrocution over lethal gas. 1953 Gallop poll. After lethal injection was introduced as a method of execution, it was immediately identified by the public as the most humane option. In a 1985 Gallop poll, only 8% of respondents believed lethal gas was more humane. Similarly, in a 1991 Gallop poll, only a small percentage of American favored the gas chamber.

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[38] Notably, in Coker, the court was evaluating three relatively recently enacted statutes, which reflected current attitudes. In contrast, the statutes mandating use of lethal gas in Arizona, California and Maryland were enacted in 1933, 1937 and 1955, respectively. Thus, the relevant statutes of those states are not even reflective of contemporary standards of decency of the state's citizenry and are clearly outdated in light of current knowledge about the suffering inherent in execution by lethal gas and the availability of more humane alternatives.

(d) Use of the gas chamber constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution

The United States Supreme Court has condemned as violative of the eighth amendment all punishments that inflict torture or lingering death, In re: Kemmler, 136 U.S. 436, 447 (1890), and punishments that "involve the unnecessary and wanton infliction of pain." Hudson v. McMillan, 503 U.S. _____, 117 L.Ed.2d 156 (1992). Moreover, "No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives." Furman v. Georgia, 408 U.S. 238, 430 (1972) (dissenting opinion of Powell, J., joined by Burger, C.J., Blackmun, J., and Rehnquist, J.).

In discerning these "evolving standards", the courts look to objective evidence of how our society views a particular punishment today. See, Coker v. Georgia, 433 U.S. 584, at 593-597 (1977); Enmund v. Florida, 458 U.S. 782, 788-796 (1982). "The clearest and most reliable evidence of contemporary values is the legislation enacted by the country's legislatures." Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

(e) The imposition of death by lethal injection in Arizona is cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, 15 and 24 of the Arizona Constitution

After the horrific execution of Donald Harding on April 6, 1992, the Arizona legislature amended their statutes to provide an alternative to the gas chamber -- lethal injection. On March 3, 1993, John George Brewer was put to death by the State of Arizona utilizing the new method -- lethal injection. The Arizona legislature was wrong. Executing by lethal injection is not any more humane than executing by the gas chamber. It is just as disturbing and horrific as execution by the gas chamber as explained in the argument above.

One witness, Jim Erickson, a reporter for the Arizona Daily Star, described what he saw:

> About one minute after the blinds opened -- approximately 30 seconds after the first of three killer drugs was administered -- Brewer jerked his neck sharply to the left, in the direction of the executioners in the 'operations room', then stared back at the ceiling. His chest heaved, then he was motionless.
>
> * * *
>
> But don't let anyone tell you that John George Brewer 'went to sleep' yesterday morning in Florence. We killed him.

See Exhibit Y.

The Petitioner respectfully requests that with respect to execution by legal injection, this court adopt the arguments against execution by lethal gas made above. Execution by lethal injection is just as inhumane, cruel and unusual a punishment as execution in the gas chamber.

Just as legislatures found that execution by electrocution was inhumane, and they changed the method to lethal gas, we should also now find that lethal injection is just as inhumane as electrocution and lethal gas.

8. Evidence of the Petitioner's prior criminal and juvenile records should not have been considered as an aggravating circumstance by the trial court at sentencing

The pre-sentence report at the sentencing hearing discussed the Petitioner's prior record, including his juvenile records and attached a pre-sentence report from a previous conviction. See Exhibit V. Evidence of the Petitioner's prior criminal and juvenile record should not have been considered as an aggravating circumstance by the trial court at sentencing. The admission and consideration of this evidence violated the Petitioner's right to a fair death sentencing procedure under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, and 15 of the Arizona Constitution. The United States Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977) held that reliance on confidential pre-sentence reports by a court violated the eighth and fourteenth amendments to the United States Constitution. The Petitioner has a right to reliable procedures at the sentencing phase of a capital trial. Id.

A review of the pre-sentence report affirms not only the lack of participation on behalf of defense counsel (since no mitigating evidence was included within the report, nor a statement from the defendant, nor a separate sentencing memo prepared and submitted) but it also fails to accurately and completely represent the true situation behind the convictions included within.

No evidence regarding the Petitioner's mental history, which dated back to his teens, was even mentioned, no educational history nor any school records were ever reviewed or submitted to the court. Where there is absolutely no investigation, a court can find not only that the trial counsel was ineffective, but that it resulted in an unfair sentencing. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

The Petitioner obviously acted on impulse; however, no evidence was presented to bolster this major defense. Trial counsel did argue in his close to some extent impulsivity and in his remarks to the trial judge at sentencing the impulsive actions were discussed; however, no experts were presented nor was any preparation, development or investigation regarding this defense during the trial. Deutsher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). In Deutsher, the trial counsel was aware that the petitioner had been hospitalized for mental problems in the past. The court said he should have called the doctors or submitted evidence regarding those mental problems at the time of sentencing. Having a doctor called as a witness can make a difference. After all, consideration of such evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538 (1987) (quoting Woodson v. North Carolina, supra.).

In California v. Brown, supra, 479 U.S. at 554, the court states:

> We do not presume prejudice in a case such

> as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.

(emphasis added).

In the present situation, the sentencing was a travesty of justice. There was basically no evidence presented and the court did not have the relevant information provided so that it could make an intelligent, informed decision regarding sentencing. The trial court was provided only the negative aspects of the Petitioner's life in the pre-sentence reports and none of the exculpatory or mitigating evidence that clearly existed and would have been easy to locate and present through the probation officer on in a separate pleading by defense counsel.

V. CONCLUSION

The accumulation of errors in the Petitioner's case rises to the level of a denial of fundamental fairness. When a number of errors, none of which alone necessarily rises to a denial of due process, accumulate to deprive an individual of his right to a fair trial and a fair sentencing, the tainted result must be reversed as a violation of the sixth and fourteenth amendments to the United States Constitution and Article II, Sections 1, 2, 4, 15 and 24 of the Arizona Constitution. See also Mills v. Maryland, 486 U.S. 367 (1988); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

For all of the foregoing reasons, counsel requests relief as follows:

(1) Grant an evidentiary hearing;

(2) Reverse the Petitioner's convictions and remand for a new trial;

(3) Vacate the sentence of death and order the imposition of a life sentence; and/or

(4) Remand to the state court for an evidentiary hearing on the Petitioner's claims that the court deems necessary.

RESPECTFULLY SUBMITTED this 8th day of March, 1993.

LAW OFFICES OF CARLA G. RYAN

By Carla G Ryan
CARLA G. RYAN
Co-counsel for Petitioner

LAW OFFICES OF LAWRENCE B. WEEKS

By Carla G Ryan
for LAWRENCE B. WEEKS
Co-counsel for Petitioner

I, certify that on the 8th day of March, 1993, I caused to be mailed, first class, postage prepaid, a copy of this pleading to:

Diane M. Ramsey
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604

Tom Marlowe
Death Penalty Law Clerk
U.S. District Court
District of Arizona
U.S. Courthouse
230 North First Avenue
Phoenix, Arizona 85025

Karl LaGrand
C/O Arizona State Prison
P.O. Box B-4849
Florence, Arizona 85232

Carla G Ryan

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DEC 04 1985

FILED
[illegible] 1985
[illegible] COURT

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,
Appellee,
vs.
KARL HINZE LaGRAND,
Appellant.

Supreme Court No. 6456
Pima County No. CR-07426

STATE OF ARIZONA,
Appell[illegible],
vs.
WALTER BURNHART LaGRAND,
Appellant.

Supreme Court No. 6457
Pima County No. CR-07426

O R D E R

Upon the Court's own motion,

IT IS ORDERED consolidating the above-entitled actions for the purposes of Oral Argument.

IT IS FURTHER ORDERED setting oral argument for Thursday, December 19, 1985, at 9:30 a.m.

IT IS FURTHER ORDERED that Appellants shall have 25 minutes each and Appellee shall have 30 minutes.

DATED this 3rd day of December, 1985.

William A Holohan
WILLIAM A. HOLOHAN
Chief Justice

TO:

Bruce A. Burke, Esq., O'Dowd, Burke & Lundquist
Stephen M. Weiss, Esq., and Elizabeth F. Claiborne, Esq., Karp, Stolkin & Weiss
Hon. Robert K. Corbin, Attorney General - Attn: William J. Schafer III, Esq., and Diane M. Ramsey, Esq.

LAWRENCE B. WEEKS
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Co-counsel for Petitioner

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(602) 297-1113
State Bar No: 004254
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,)
Petitioner,) NO: CIV 92-026 TUC JMR
vs.)
SAMUEL LEWIS, Director, Arizona Department of Corrections,) **AFFIDAVIT**
Respondent,)
GRANT WOODS, Attorney General of the State of Arizona)
Additional Respondent.)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DAVID GERSON, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the State of Arizona. That your affiant was admitted to practice in Arizona in 1974. However, he did not start to practice immediately and at that time that he was appointed to represent Karl LaGrand, he had had approximately six to seven years'

experience;

2. That when your affiant was appointed to represent Karl LaGrand, in 1983, it was the first time that he had represented a defendant in a capital murder case;

3. That at the time of his appointment, your affiant had no special CLE training in handling a capital case and that your affiant was uninformed of the level of experience and tasks and tactics and strategies which capital cases required;

4. That your affiant initially approached the Karl LaGrand murder defense case as he had his previous criminal cases: like a "normal felony, just as a drug case or a robbery";

5. That in hindsight, your affiant realizes he was neither prepared nor informed as to what would be involved and that your affiant was unquestionably overwhelmed both by the high profile nature of the case and by of his lack of experience;

6. That when Tom Higgins originally contacted your affiant about accepting this appointment, your affiant had grave concerns, however, Tom Higgins advised your affiant that once the motion to suppress Karl LaGrand's incriminating statements was granted, your affiant would be able to plead Karl LaGrand to a life sentence;

7. Although Higgins was available to meet with your affiant; they never strategized nor discussed potential defenses and work to be done in this case;

8. That your affiant never had an investigator assigned to work on this case;

9. That your affiant did not speak to family members;

10. That your affiant had a poor relationship with Mr. LaGrand and there was little or communication between them;

11. That because Mr. LaGrand was serving time at the Arizona State Prison in Florence, it was difficult for your affiant to establish an adequate attorney-client relationship. Therefore your affiant was unable to explore with his client his childhood and adolescent years in order to uncover evidence which would be helpful in the trial or at the penalty stage of the case;

12. That your affiant never comprehensively researched, investigated or developed any evidence regarding the petitioner's mental state;

13. That your affiant never considered impulsivity or temporary insanity as a viable defense;

14. That if your affiant was appointed to handle this case today, that your affiant would do several things differently; including, but limited to:

a. Your affiant would approach the psychological evaluations differently. Your affiant now believes that the evaluations performed in 1983 and 1984 were insufficient and uninformed. Your affiant would provide relevant documentation of family history, school records, juvenile court records, and meet with the psychological expert prior to the expert meeting with Karl LaGrand.

b. Your affiant would hire an investigator immediately;

c. Your affiant would interview all witnesses prior to trial and not rely on transcripts and typed statements or medical reports;

d. Your affiant would certainly consider defenses such as impulsivity, temporary insanity, as well as other legal issues that were not utilized in 1983;

e. That your affiant would, as of his first day of appointment, begin working on mitigation and developing evidence of the petitioner's background and evidence of extent of the dysfunctionality of the family rather than waiting until after the verdict to consider the penalty phase.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 5th day of March ~~February~~, 1993.

David Gerson

SUBSCRIBED AND SWORN to before me this 5th day of March ~~February~~, 1993 by DAVID GERSON.

Notary Public

I, certify that on the _____ day of March, 1993, I caused to be mailed, first class, postage prepaid, a copy of this pleading to:

Diane M. Ramsey
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

Arizona Capital Representation Project
Arizona State University
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Tempe, Arizona 85287-0604

Tom Marlowe
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230 North First Avenue
Phoenix, Arizona 85025

Karl LaGrand
C/O Arizona State Prison
P.O. Box B-4249
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____

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Co-counsel for Petitioner

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(602) 297-1113
State Bar No: 004254
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,)
Petitioner,) NO: CIV 92-076 TUC JMR
vs.)
SAMUEL LEWIS, Director, Arizona Department of Corrections,) AFFIDAVIT
Respondent,)
GRANT WOODS, Attorney General of the State of Arizona)
Additional Respondent.)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TOM HIGGINS, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the state of Arizona and has been practicing criminal law in the state of Arizona for over 17 years;

2. That your affiant's practice has consisted almost exclusively of criminal law and your affiant has practiced

extensively in state and federal courts in Tucson;

3. That your affiant has represented numerous individuals charged with first degree murder and has tried many such cases, several of them being potential capital cases;

4. That your affiant was originally appointed by the presiding judge to represent Karl LaGrand after the Pima County Public Defender's Office withdrew because of a conflict;

5. That your affiant represented Karl LaGrand through the motion to suppress his statements, which was won;

6. After winning on the motion to suppress the statements, your affiant approached the trial judge, Judge Hannah, and requested to be allowed to withdraw because he did not have enough time to further develop and adequately and competently represent Karl LaGrand in a capital case because of your affiant's case load;

7. That Judge Hannah would not allow your affiant to withdraw, but agreed to allow your affiant to substitute in additional counsel as long as your affiant was willing and available to consult with the new counsel;

8. That your affiant agreed to be available to assist;

9. That David Gerson and your affiant conferred about Mr. Gerson assuming representation of Mr. LaGrand;

10. That your affiant met with Mr. Gerson and discussed the case at length, including the fact that in his opinion

this was a trial case and one that the State would never offer a plea and would definitely pursue a death sentence;

11. Your affiant further explained the work that needed to be done for both the guilt phase and penalty phase was substantial and immediate;

12. That your affiant had concerns about David Gerson handling the case because of Gerson's inexperience in handling capital murder cases; however, your affiant felt that if Gerson was working with co-counsel (the counsel for Walter LaGrand) and had the benefit of that guidence, he would be able to handle the case;

13. That your affiant further felt that Gerson had the time to adequately prepare and to investigate all of the potential defenses and mitigation to be presented at the penalty phase;

14. Gerson never asked your affiant for assistance or indicated that he needed help of any kind once he took over representation of Mr. LaGrand

15. Your affiant discussed in detail with David Gerson the potential defenses, including: implicating Walter LaGrand as the perpetrator or the impulsivity defense. Your affiant felt there were competency issues and potential McNoughton issues that needed to be developed and that there were publicity problems, as well as tactical decisions to be made such as whether to request a severance for Walter LaGrand's trial;

16. That Gerson took over the responsibility on the case before your affiant had located and hired potential experts and before he started any background check on the petitioner.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 1 day of march ~~Janua~~ry, 1993.

Thomas E. Higgins Jr.
Tom Higgins

SUBSCRIBED AND SWORN to before me this 1 day of march ~~Janua~~ry, 1993 by TOM HIGGINS.

Kelly Clausen
Notary Public

My commission expires:
May 31, 1994

LAWRENCE B. WEEKS
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Tempe, Arizona 85287-7906
(602) 967-0732
State Bar No: 004273
Co-counsel for Petitioner

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Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,)
) NO: CIV 92-026 TUC JMR
Petitioner,)
)
vs.)
) AFFIDAVIT
SAMUEL LEWIS, Director,)
Arizona Department of)
Corrections,)
)
Respondent,)
)
GRANT WOODS, Attorney General)
of the State of Arizona)
)
Additional Respondent.)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Bruce A. Burke, upon his oath, deposes and states as follows:

1. That I am an attorney licensed to practice in the State of Arizona, and that I was admitted to the Arizona Bar in October, 1975.

2. On January 24, 1983, I was appointed to defend Walter

LaGrand in the case of *State v. LaGrand*, No. CR-7426. The other defendant in the case was Karl LaGrand, Walter LaGrand's brother, who was represented by David Gerson, an attorney in Tucson.

3. From the very beginning of my representation of Mr. LaGrand it was clear to me that the State would seek the death penalty for the Defendants if they were convicted of first degree murder. I tried without success to negotiate a plea to a life sentence. The State refused to offer a plea to a life sentence.

4. During the proceedings at the trial itself, I can recall no instance when David Gerson and I communicated in advance of a witnesses' testimony about what questions I should ask or not ask of the of the witness.

5. Prior to giving his closing argument on behalf of Karl LaGrand, I recall that Mr. Gerson informed me that he had "cribbed" substantial portions of the closing argument on the issue of reasonable doubt from another criminal case handled by another attorney.

Dated this 7th day of March, 1993.

Bruce A. Burke

SUBSCRIBED AND SWORN to before me this 7 day of March, 1993 by Bruce A. Burke.

Notary Public

My Commission Expires: 2-7-95

LAW OFFICES OF LAWRENCE B. WEEKS
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State Bar No: 004273
Co-counsel for Petitioner

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(602) 297-1113
State Bar No: 004254
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,)
Petitioner,)
vs.)
SAMUEL LEWIS, Director, Arizona Department of Corrections,)
Respondent,)
GRANT WOODS, Attorney General of the State of Arizona)
Additional Respondent.)

NO: CIV 92-026 TUC JMR

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

ROBERT J. HIRSH, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the state of Arizona and has been practicing criminal law in the state of Arizona for over 28 years;

2. That your affiant has been certified as a specialist in criminal law by the State Bar Association;

3. That your affiant's practice has consisted almost exclusively of criminal law and your affiant has practiced extensively in state and federal courts in Tucson;

4. That your affiant has represented numerous individuals charged with first degree murder and has tried many such cases, several of them being potential capital cases;

5. That your affiant has tried many cases involving the defense of insanity, temporary insanity or impulsivity pursuant to State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981), and is familiar with the procedures which must be followed by a defense attorney to competently pursue these types of defenses under Arizona state law;

6. That under Rule 15 of the Arizona Rules of Criminal Procedure, defense counsel is entitled to interview the state's witnesses in advance of trial. Based upon your affiant's familiarity with the state criminal justice system, your affiant believes that pre-trial interviews, pursuant to Rule 15, with the state's witnesses are an essential part of the preparation of the defense of any case. In cases in which a confession is obtained and will the thought to be introduced against an accused, it is vital to the defense that all police officers who participated in the events leading up to the interrogation, any doctors or hospital staff involved in the interrogation and the interrogation itself, be interviewed in advance of the motion to suppress in order to effectively

present the issues to the court relevant to a motion to suppress that statement or to make a strategic decision as to how to best utilize the confession and if it should be suppressed;

7. Your affiant believes that it is essential that interviews with all the detectives who participated in the investigation of the case against the accused, and all other state's witnesses, be interviewed, both to critically examine their testimony from the perspective of cross-examination and to explore the possible exculpatory evidence;

8. That your affiant believes that it is absolutely essential that psychiatrist to be called by the state to rebut a defense of insanity be interviewed thoroughly in advance of trial. Your affiant believes that pre-trial interviews of the state's psychiatrists in such circumstances are invaluable, both from the perspective of developing information to challenge the conclusions of the witnesses that the defendant was "sane" and to develop potentially exculpatory evidence and information tending to prove that the defendant was not sane;

9. That your affiant believes that it is absolutely essential that psychiatrists be adequately prepared prior to their interview with a particular defendant and to be educated regarding the defense of insanity, impulsivity or temporary insanity;

10. That your affiant believes that the failure to interview the state's psychiatrists, investigating detectives,

and all other state witnesses and officers participating in an interrogation of an accused, and all other state witnesses in a case in which the defendant is charged with first degree murder and the potential defenses are insanity, impulsivity or temporary insanity, falls below minimal standards of competence required of attorneys to practice in state courts under the rules of procedure in existence in the state of Arizona. Your affiant can conceive of no circumstances in which your affiant would not conduct such witness interviews, in the absence of extraordinary tactical circumstances;

11. Your affiant further believes that it is imperative that in an insanity case, impulsivity or temporary insanity case, all exculpatory materials, such as prior hospitalizations, school records, juvenile detention records, home placements, family members and other potential witness statements all be provided to mental health experts who will evaluate the defendant. Moreover, these records should be sent to the experts before they examine the accused, since it is much easier to initially persuade the expert that the accused is insane than to change his opinion after he has committed himself to an opinion of sanity. Failure of counsel to do so, falls below minimum standards of effective assistance of counsel;

12. Your affiant further believes that trial counsel needs to be the advocate and to aggressively search out experts to substantiate the defense of insanity, impulsivity

or temporary insanity and not to allow the experts to, with limited information, make the initial decision. Failure of counsel to do so, falls below minimum standards of effective assistance of counsel.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 1st day of ~~January~~ March, 1993.

Robert J. Hirsh

SUBSCRIBED AND SWORN to before me this 1st day of ~~January~~ March, 1993 by ROBERT J. HIRSH.

Catharine H. Rowe
Notary Public

My commission expires:
10-10-94

A F F I D A V I T

STATE OF ARIZONA)
)ss
COUNTY OF PIMA)

I, **Richard W. Bozich**, of **Western Investigative Services** first being duly sworn does depose and state:

1. Affiant was retained by defense counsel, **Carla Ryan** and **Larry Weeks**;

2. Affiant has reviewed all of States disclosures;

3. Affiant has found that certain mitigating circumstances were omitted, overlooked and disregarded, to wit:

A. The trial attorney for **Karl LaGrand** did not conduct his own investigations nor did he retain an investigator;

B. Crime scene photographs/inspection was not made;

C. Witnesses were not thoroughly interviewed or potential witnesses were not located and interviewed, to wit:

1. Mother, sister, family members, stepfather, friends, foster parents, prior probation officers, prior mental health providers, juvenile counselors and neighbors in Sierra Vista;

D. Stepfathers military record was not obtained;

E. Lack of extensive interviews with **Karl LaGrand**;

F. Failure to obtain parents divorce records;

G. Juvenile records were not obtained;

H. School records were not obtained;

I. Medical records were not obtained;

J. An independent psychological evaluation was not made;

K. Discrepancies between victims statements and confessions went unchallenged;

4. Affiant has, in his investigation, discovered certain evidence and witnesses that could have and should have been brought to the attention of the trial court on behalf of **Karl LaGrand**, to wit:

A. Affiant has interviewed foster parents and has learned that **Karl LaGrand** was definitely a very shy and passive individual - that he never initiated or instigated any wrongdoing - that **Karl LaGrand** was most certainly a follower and would always listen to his brother **Walter**;

B. Affiant has interviewed both the mother and sister of **Karl LaGrand** and learned that **Karl** had suffered abuse at the hands of his stepfather - that during his formative childhood he was placed in a German orphanage by his stepfather - it was also learned that **Karl LaGrand** also suffered abuse by his mother through lack of control and neglect - further, it was learned that **Karl LaGrand** had consistently gotten into trouble as a juvenile and that this occurred always when he was with his brother **Walter** or at the direction of **Walter** an example being that of setting fire to a golf course - both the mother and sister to **Karl** related incidents of personal injury such as **Karl** being hit in the head with a shoe, falling off a bike and injuring his head - that the stepfather was an alcoholic with a violent temper - that there was always potential for racial problems due to **Karls** stepfather being black and his mother being caucasian;

C. Affiant has interviewed both Juvenile and Adult Probation Officers who all concur that **Karl LaGrand** was extremely passive, non-violent, immature, and easily led - Probation Officer **Langlois** stated that he never had any problems with **Karl** and felt that all existing problems were caused by **Walter LaGrand**. **Langlois** stated further that he documented this and formally requested that **Karl LaGrand** and **Walter LaGrand** be separated. **Langlois** also stated that he felt strongly that **Karl LaGrand** could be rehabilitated;

D. Affiant has interviewed Juvenile Detention/Center authorities who all concur that **Karl LaGrand** was not the problem and that he was always led into difficult or illegal circumstances by his brother **Walter**;

E. Affiant has requested and received certain records from both Juvenile Authorities and Medical Centers;

F. Affiant has requested further information and records from all public and private institutions in which the defendant was affiliated with; and

5. Affiant has, after review of the aforementioned, does conclude that there are, in fact, many mitigating circumstances to support a new trial and/or in the alternative support a new hearing on the penalty phase.

Affiant sayeth nothing further.

DATED this 8th day of March, 1993

Richard W Bozich
RICHARD W BOZICH

SUBSCRIBED AND SWORN to before me this 8th day of March, 1993, by **Richard W. Bozich** of **Western Investigative Services.**

VIVIAN A. BOZICH

NOTARY PUBLIC

My Commission Expires:

____

LAW OFFICES OF CARLA G. RYAN
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Tucson, Arizona 85704
(602) 297-1113
State Bar No: 004254
Co-counsel for Petitioner

LAW OFFICES OF LAWRENCE B. WEEKS
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State Bar No: 004273
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR **AFFIDAVIT**

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

JOSEPH N. LANGLOIS, upon his oath, deposes and states as follows:

1. That your affiant was a juvenile probation officer in the State of Arizona, County of Cochise for approximately 22 years;

2. That your affiant first met Karl and Walter LaGrand in approximately 1973;

3. That your affiant was primarily responsible for Karl;

4. That Karl LaGrand's step-father had a violent temperament;

5. That Mrs. Emma LaGrand, Karl's mother, did not know how to handle the child and had no parenting skills whatsoever;

6. That Karl's mother objected to Karl being placed in the Vision Quest street program because it required her to participate in certain portions and she did not want participate;

7. That during the eight years that your affiant worked with Karl, most of Karl's actions were of the "incorrigible-type"; such as running away, disobedience, shoplifting;

8. That in your affiant's opinion Walter was more direct and the leader and Karl followed Walter;

9. That Karl was more of a pacifist;

10. That Walter would attempt to shift the blame on to Karl when the two would get caught;

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11. That your affiant trusted and liked Karl a lot.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this ____ day of March, 1993.

Joseph N. Langlois

Joseph N. Langlois

SUBSCRIBED AND SWORN to before me this 3 day of March, 1993 by JOSEPH N. LANGLOIS.

Kathy M. [illegible]

Notary Public

My commission expires: My Commission Expires Jan. 11, 1994

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Affiant, Timothy J. Derning, Ph.D., M.S.Ed., being first duly sworn upon his oath, deposes and states that:

I am a clinical psychologist licensed to practice in the State of California. I specialize in the assessment and treatment of poorly-controlled, impulsive, dangerous, or violent behavior disorders, mental illness, psychopathology, abuse trauma, mental retardation, and learning disorders. I have a private practice in Walnut Creek, California, in which I treat adults and children regarding issues of impulse control and attention deficit disorders, conduct disorders, low self-esteem, family and interpersonal problems, depression, post-traumatic disorder, and issues related to alcoholics and abusive families of origin. I provide consultation to families and schools of youngsters with disruptive behavior disorder. I also conduct psychological and neuropsychological assessments relative to intelligence, cognitive functioning, problems in learning, developmental delay, mental retardation, personality functioning, psychopathology and mental illness.

I also am employed as a Clinical Staff Psychologist in the Forensics Program of Stockton Developmental Center (SDC), a state hospital in Stockton, California. Currently, I serve as Chair of the Department of Psychology at SDC. My clinical responsibilities at SDC include the assessment and treatment of behavior disorders, cognitive functioning, and psychopathology, in addition to assessing competency to stand trial. As staff psychologist in the Forensics program, I routinely present expert testimony to the courts regarding issues of dangerousness, mental illness and psychopathology, and placement recommendations.

I am retained as consulting psychologist to Las Trampas, Inc., a residential and community-based program for the mentally retarded in Lafayette, California. I have continued post-doctoral training in neuropsychology, learning disorders and cognitive deficits through the Continuing Education

Program of the California School of Professional Psychology in Alameda/Berkeley, California.

I received my Baccalaureate Degree in Psychology at the University of Wisconsin-Parkside, a Masters Degree in Counselor Education from Northern Illinois University, a Masters Degree and Doctoral Degree (Ph.D.) in Clinical Psychology from the California School of Professional Psychology at Berkeley.

At the request of counsel for Mr. Karl LaGrand, I reviewed numerous records and documents of approximately 900 pages. By means of clinical interview, psychological tests and record review, I was asked to evaluate the nature and extent of abusive and traumatic experiences endured by Karl LaGrand during his formative years as well as the long-term impact these experiences may have had on his psychological and characterological development. I was also asked to form an opinion regarding Karl LaGrand's mental state at the time of the crime. Finally, I was also asked to form an opinion as to whether these mitigating factors were sufficiently investigated, developed and explained for the benefit of the court in deciding matters relative to Karl LaGrand's case.

The documents I was given contained, but were not limited to, the following:

a. The school records from the Arizona Department of Education;

b. Psychological report of June 30, 1977 by Richard Dymeck, certified school psychologist;

c. Psychological report dated April 6, 1978 by Jean Chambers, Ph.D.;

d. Police reports and police investigation reports from Sierra Vista, Arizona dated January 21, 1975;

e. Records and progress reports from Vision Quest;

f. Records and progress reports from Youth Opportunity Unlimited (YOU);

g. Testimony from the aggravation/mitigation hearing, September 17, 1984 and December 12, 1984;

h. A transcript of Karl LaGrand's confession to Detective Brackman;

i. A transcript of the interview dated Friday, January 8, 1982 in the Emergency Room of St. Mary's Hospital;

j. Initial school intake report from Smith Middle School dated April 3, 1978 by Van Taylor;

k. A Missing Person Report from Sierra Vista Police Department dated September 10, 1973;

l. The psychiatric discharge evaluation for Karl LaGrand dated January 4, 1979 by John L. Schorsch, M.D.;

m. The transcript of an interview of Joseph N. Langlois, former (retired) probation officer of Karl LaGrand;

n. A psychological report by Mickey McMann, Ph.D. dated September 22, 1976;

o. The pre-sentencing report by Dr. Phillip Bolch;

p. The transcript of an interview by the Pima County Public Defender with Dr. John Lewis, Kathy Baker;

q. Transcripts of interviews with Dawn Marie Lopez.

r. The transcript of an interview with petitioner's mother.

In addition to a through review of the records cited above, I met with Mr. Karl LaGrand in three sessions conducted over two consecutive days at the Arizona State Penitentiary in Florence, Arizona (December 12 and 13, 1992). These sessions consisted of a clinical interview and psychological testing for a total contact time of 10 hours. The psychological assessment instruments administered included the following: Portions of the Hare Psychopathology Checklist - Revised, the Checklist for Child Abuse Evaluation, the Personality Assessment Inventory (PAI), the Kaufman Brief Intelligence Test, the Thematic Apperception Test (TAT), the Rorschach Inkblot Test, the Multiscore Depression Inventory and the Beck Depression Inventory.

My opinions, and reasons for these opinions, relative to Karl LaGrand's family, early developmental history, psychosocial development, abusive experiences, psychological trauma, explosive behavior patterns and criminal intent during the events of January 7, 1982, as I have developed them in examining this case, are offered below.

OPINION: KARL LAGRAND WAS SUBJECTED TO NUMEROUS EXPERIENCES OF NEGLECT, VERBAL ABUSE, EMOTIONAL DEPRIVATION, PARENTAL INDIFFERENCE AND APATHY, AND PSYCHOLOGICAL ABUSE AS HE WAS GROWING UP.

The reason for this opinion are as follows:

The records, reports and transcripts that I reviewed from teachers and professionals who knew the family, in addition to my interview with Karl LaGrand, provide many details of the LaGrand household and instances in Karl's childhood and development in which significant emotional deprivation, neglect, physical abuse and psychological trauma in the form of anxiety, fear, panic and isolation were prominent. For example, when he was a toddler, Karl was separated from his mother for approximately two years while he lived in a German orphanage run by nuns. Mrs. LaGrand remembers that this placement was harsh for Karl and his brother. They did not get very good care. In one interview transcript, Emma LaGrand spoke of this orphanage and recalled, "the kids were playing in dirt and a few of them got sick and kids got lice. They had to shave their hair." She indicated that Karl and his brother were more withdrawn after that experience. She said, "They were telling a story, how the nuns don't gave them nothing to eat and then punished them and then talk like that. All the kids in the room and cold."

During these early years, Karl also spent approximately one year living with his grandmother because his mother worked during the day and at night. It was after the grandmother became ill that Karl was sent to the orphanage.

Emma LaGrand married Massie Lee LaGrand in 1967 when Karl was approximately 4 years old. Soon after, the family left Germany and came to the United States. Mr. LaGrand adopted the three children, all of whom were born out of wedlock, each of a different father. The family moves many times due to Mr. LaGrand's transfers in the military, going from Texas to Arizona back to Germany, back to the United States to Alabama and back to Arizona. Emma and Massie LaGrand divorced in 1975 when Karl was approximately 12 years old.

During this troubled marriage (when Karl was between the ages of four and twelve), alcoholism and violent behavior were commonplace in the LaGrand home. The family environment was disorganized and unstable. The parents were not involved in parenting the children, except for their attempts to use abusive punishments to manage their behavior. They did not lead or guide the children, they did not become voluntarily involved in school assistance. This pattern continued even much later in Karl's life when he was placed at a treatment program, Vision Quest, as an adolescent in need of supervision. The reports indicate that Emma LaGrand was not cooperative with treatment and showed no interest in assisting Karl: "Karl's mother's attitude is totally negative toward Karl and Vision Quest. She wants no contact with either and has no desire to participate."

The children were often left to fend for themselves. There was very little in the way of nurturance or guidance. Karl recalled during the clinical interview: "There was a lack of communication and expression. Not any openness. People didn't talk about things (like) what were your feelings or problems." Asked what he did with them, he said, "Kept to myself". Asked what would happen if he brought them up, he replied, "I don't know. I think I didn't know how. When I had problems...I got an ass-whipping for problems in school. I'd never say anything about it. I don't think we were taught to express yourself and we could work it out, that it was OK to express yourself. We were never taught that. There was never any time for just sitting, to take time to talk. It never happened in our family."

Joseph Langlois, a retired 22-year veteran probation office with Cochise County Juvenile Probation Department who worked with Karl, said about the LaGrand family, "It was a no win situation, even when they were like 9 and 10 years old...They didn't have no food in the home. Mama wasn't treating them right."

At the very young age of six, Karl was doing things more commonly done by older, troubled teenaged youth. Mrs. LaGrand herself recalled, "When they go into the first grade, they start running off." Karl remembered beginning to drink hard liquor fairly regularly at age eight or nine, and having a severe alcohol problem (e.g., drinking to the point of blacking out) by age 12. Joe Langlois: "The obvious solution (for Karl) was to leave home, 9 years old leaving home. And that tells you a lot about the kid."

Asked how he thought the lack of guidance and adult supervision might have affected him, Karl responded, "Probably in making decisions and opening up to people. Discussing. Instead of opening up, asking for advice or opinions, I would just blindly go ahead and make decisions on my own and not know what the end result would be. Even when I did get advice, I couldn't trust it or listen or ask for advice. (That was true by age 8 or 9 according to Karl.) Never had someone come freely to help. You get skeptical. Like 'why are they doing that?' You pull back and stay away. I would just jump into something without giving it any forethought." (Did that get you into trouble?) "Yeah." (Like the bank?) "I knew what I wanted. I definitely didn't give it enough forethought."

This is contemporaneous affirmation of the fact that Karl never developed the capacity and ability to confront unpleasant or conflicting situations. He simply was not shown how by his parents. Indeed he avoided them by running away or just reacting.

Evaluations and reports pertaining to Karl and his family further substantiate this profile.

a. A learning disabilities record prepared by Maxine L. McIntosh when Karl was in the fourth grade speaks to the emotional deprivation in the family: "Karl is a very volatile child. He comes from a home depravation of human associations and a lack of support and stability...I can only foresee a bleak situation for this little boy - what a shame - he needs love and attention so badly."

b. Another report by (Mrs.) Lou Allen, social services worker for the Arizona Department of Economic Security, dated December 16, 1975, states, "Mrs. LaGrand is serious with little levity in her life...Mrs. LaGrand has structured her entire life on a monetary base. She expends her total energies on financial matters, leaving no time to meet the emotional needs of her children...Mrs. LaGrand, I am confident, could never understand the need for an occasional hug or kiss..."

c. In a psychiatric discharge evaluation by John L. Schorsch, M.D. of Vision Quest, it was Dr. Schorsch's opinion of the LaGrand family that, "Karl comes from a very neglectful, at times severely emotionally and physically abusive family."

d. A psychological report by Psychologist Jean F. Chambers, Ph.D. from April, 1978, likewise states

> that "Karl seems to feel rejected and unloved and has a pretty miserable life to date." Dr. Chambers also recommended counseling in her report because, "Karl has been rejected and abused most of his life."

Both LaGrand parents had drinking problems, Massie LaGrand had a significant problem with alcohol, the severity of Emma LaGrand's alcoholism is minimized by Karl, although he stated, "There were times when she would have a glass of scotch during the day." Karl claimed he could not recall his mother drinking alcohol to the point of drunkenness. However, he did recall her being "tipsy". He saw his stepfather drunk many times. When Massie LaGrand drank, Karl remembered him as being "loud, stumbling, and aggressive. Getting into arguments with mom or with us. Then he would hit."

Karl described seeing his mother being battered by Mr. LaGrand saying, "It wasn't like a beating, but he hit her a couple of times with open and closed fists." Asked if he, Karl, tried to stop the violence, Karl answered that he tried to holler to stop it, but that was all he could do. Regarding Massie LaGrand, Joseph Langlois offered the opinion: "I think both boys were real fearful of their father or the step-father in this case."

In addition to being abusive to Emma LaGrand, Massie LaGrand was often severely physically abusive to Karl and his brother. In recounting her husband's abusive treatment of the boys, Mrs. LaGrand stated that he beat both of the boys, "sometimes he beat them really hard and I had to go in between it...He took his belt off, and he was so mad sometimes...like one time, I don't know, they called me from work and Walter, Karl's brother, was bleeding in the head."

Karl said of his father, "He whipped me pretty bad...He would punch me and my brother. He had big graduation rings and he would smack me in the chest and get the belt out. He would tell me to bend over. I tried to protect myself, so I got hit on the back and the legs. They were pretty serious whippings, to say the least. I was pretty scared of him." When asked how many times would he be hit, Karl replied, "I don't know. The more you tried to resist, the more you got it." Asked if he thought some of the Massie LaGrand's beatings were excessive, Karl replied, "As far as I was concerned, all his beatings were excessive. He would punch us."

A significant factor in Karl's delinquency was the beatings he took. Karl was caught in a cycle of misbehavoir, beatings, and further misbehavoir. Mrs. LaGrand remembered, "The more they runned off, the more he beat them, the more angry he got..." One Missing Person report from Sierra Vista Police Department, when Karl was not quite 10 years old, supports these claims. The police report states that the probable cause of absense was "discipline at home." Minor childhood transgressions, such as Karl's spilling a bucket of paint while helping his father were dealt with by beatings, as a means to disclipline and set limits.

These beatings were impulsive, excessively harsh, unprovoked and unpredictable. "Sometimes it would happen in anger on the spur of the moment," Karl stated. Asked if his mother ever beat him, Karl said, "Dad was more the disciplinarian. Mom slapped me once or twice across the chops, but not hard. She never had no control". Implements were often used in these beatings. These included such things as a belt, sword, angle iron, switches, and Massie LaGrand's fists with large "graduation rings" on several of the fingers.

"At the time I was living with my stepfather, Massie LaGrand. I knew I couldn't go home, because Dad was pretty rough." In this quote, Karl LaGrand is describing the sequence of events following a problem in the 4th grad. (described below). Karl told of how he wandered about the neighborhood that night after school, afraid to go home. He finally fell asleep in a culvert behind his house. It rained during the night and Karl attempted to return to school the next day in wet clothes "like it was a regular school day." The principal and teachers spotted him coming back to school and he was brought into the principal's office. They were concerned about him. The office personnel gave him hot milk and cookies. Karl remembers he was running a fever. I asked Karl if this kind of treatment was confusing to him at the time, and he acknowledged that it was, "I was confused because I didn't get an ass-whipping. I would have been whipped pretty bad, especially for something like that." Asked if he was ever able to defy his father and challenge his abusive behavior as he grew older, Karl answered, "No. If anything happened you'd run away."

Reports from teachers and professionals who evaluated Karl during the years 1973 to 1981, when Karl was between the ages of 9 and 18, continue to consistently indicate a family environment that was psychologically toxic to these youngsters. It was chaotic, unpredictable, poorly-managed, hostile and bitter.

The reports from the treatment programs in which Karl was involved as an adolescent have numerous references to his interest in stabilizing his family situation and being able to return home. He recognized the problems there, but consistently sought to make things better. A report from Vision Quest dated August, 1978 says, "No doubt that Mother's non-involvement affects him (Karl) deeply." Likewise, process notes from Youth Opportunity Unlimited (YOU) state that Mrs. LaGrand did not answer Karl's letters and Karl was worried whether Mother cared for him. During one period, Karl was discharged from the YOU program to return home. He stayed with his mother, but the experience failed and Karl was returned to another program, Vision Quest, in less than a year. It was not until much later in his life, when he was placed with a foster family, the Barstows, that Karl experienced a stable non-institutional environment. "The Barstows have had an effect on my life. They are the first real stable family."

OPINION: EARL LAGRAND WAS TRAUMATIZED BY THE ABUSE HE EXPERIENCED AS A CHILD GROWING UP IN THE LAGRAND FAMILY. THESE TRAUMATIC EXPERIENCES DECIMATED THE NORMAL COURSE OF HIS PSYCHOLOGICAL DEVELOPMENT AND RESULTED IN SERIOUS PSYCHOLOGICAL IMPAIRMENTS AND SYMPTOMS. THESE WERE DOCUMENTED THROUGHOUT HIS CHILDHOOD AND ADOLESCENCE BY PROFESSIONALS WHO ASSESSED HIM.

The reasons for this opinion are as follows:

The effects of being raised in such a family environment as the LaGrand family provided, are usually psychologically and emotionally devastating to a child. Attachment behavior is a cornerstone in psychological and social development and is primary in significance and importance. There is a fundamental requirement of healthy psychological development to feel safe and to make strong affectional bonds and attachments to parents or parent substitutes. Many forms of psychological and emotional distress, such as anxiety, depression, rage reactions, and isolation are also related to poor attachment and bonding experiences in infancy and early childhood.

The sense of safety and security provided by a stable attachment contributes to the psychological health of the individual. When a child cannot establish a perception of safety, has little or no supervision, fears for his safety at the hands of the parents, is belittled, punished, terrorized, has no sense of control over events in his life, the trauma of such experiences often arrests psychosocial development. The child's primary goal in such a circumstance is directed away from the usual developmental tasks of mastery, achievement, and social development, and becomes narrowed to avoidance of pain and harm. It is a common phenomenon among abused children and children from alcoholic families that they maintain their chronic anxiety, depression, low-self esteem, and vigilance to signs of impending danger. Very often such children feel different and "bad" and become isolated from their peers and community. The world is too threatening, every situation is potentially dangerous because rage is unpredictable and unrelated to real events and behavior. Human emotionality becomes fused with rage and abuse. These effects commonly carry on into adulthood.

The effects of abusive traumatic experiences in childhood are often compared to post-traumatic stress disorder as it is experienced by victims of violet crime, war veterans, etc. Such severe trauma frequently results in a chronic state of feeling overwhelmed. Psychological trauma such as this frequently causes an individual to be vulnerable to intense emotion and often intolerant of social irritants, stress, anxiety, sudden surprises and the like.

In the wake of such trauma are symptoms of depression, anxiety and hypervigilance. Hypervigilance refers to the need to be constantly on the look out for danger, even in non-threatening situations. These are common psychological symptoms among adults and children abused in childhood. These individuals remain alert, ready, "on edge" and responsive to the slightest hint of danger. Other common symptoms include seeing things as being worse than they really are, and a loss of objectivity and distance from problems. Trauma victims often develop compulsive patterns in which they repeat behaviors over and over, with virtually no learning, in a failed attempt to gain a sense of mastery of their experience.

There are similar issues with reference to the psychological symptoms of adult children of alcoholics. Families in which alcoholism is prominent are marked by chaos and unpredictability. Due to the disinhibiting affects of the alcohol, physical violence in an uncertain, changing and unpredictable environment is common.

As a result, children grow up with an impaired ability to trust and feel safe. Because of the unpredictability of explosive violent outbursts in physically abusive and alcoholic families, the children who grow up in such families are often extremely sensitive to emotional agitation, particularly antecedent to anger, and monitor for signs that emotions are getting out of control. This chronic distortion and disturbed perception of the environment, means that strong emotions and conflict are virtually intolerable. Chronic feelings of vulnerability and intimidation perpetuate the experience of victimization. Under intense and emotionally stressful conditions the traumatic experiences are rekindled and panic quickly overwhelms the individual. Frequently, even mild verbal expressions of annoyance are perceived as a threat.

As has been previously suggested in several of the reports cited above, many professional evaluations I reviewed identified significant problems Karl had expressing his anger. The pre-sentence report dated May 23, 1985 quoted Dr. Philip Bolch (Balch), a psychologist, as stating, "Karl lacks adequate ways of expressing his anger." Dr. Bolch also stated that Karl seems to be overwhelmed with stress at times and that this impairs his ability to function.

Quotations from the reports mentioned previously in this affidavit, identify the same issues. Frequently, statements are made stating that Karl has a "low threshold for anxiety and tends to overreact to problems", that "he is an insecure and anxious boy, has poor self concept and little confidence in himself." "He is particularly afraid of angry, hostile acts, both real and imaginary." "He is easily overwhelmed by anxiety which disrupts organized thinking and definitely interferes with academic and intellectual tasks." The MMPI from 1978 suggests Karl having a low threshold for anxiety and a tendency to overreact to problems, also that he doesn't posses very good coping mechanisms.

Throughout Karl's formative life, often evident in psychological reports, are seen the psychological symptoms and traits of a dysfunctional family background. The reports I reviewed indicated the following:

a. A psychological report by Jean F. Chambers, Ph.D. from April 1978 (Age 14) describes Karl as being chronically tense and anxious, having a low threshold for anxiety and a tending to overact to problems. Her diagnosis is "severely emotionally handicapped."

b. Dr. Schorsch, cited above in his psychiatric discharge evaluation of January, 1979 (Age 16) states that his diagnostic impression is "Depression improved." Dr. Schorsch states that Karl, "exaggerates and overdetermined his past behavior and tends to blame himself for his separation from his family...he (Karl) carries a lot of internal guilt for his behavior and has difficulty working through his angry and perhaps sad feelings toward the rejection toward his family and blaming himself."

c. A psychological report by Micky McMahon, Ph.D. of September, 1976 (Age 11-12) states that, "Karl is an insecure and anxious boy, he has poor self concept and little confidence in himself." "He is particularly afraid of angry, hostile acts both real and imaginary." "He is easily overwhelmed by anxiety which disrupts organized thinking and definitely interfere with academic and intellectual tasks."

d. In the pre-sentence report for the crime of armed robbery and kidnapping, relied on an arlier psychological evaluation by Dr. Phillip Bolch which states that Karl "tends not to adequately anticipate the consequences of his actions" and "seems to become overwhelmed with stress at times and at those times, his ability to function becomes quite impaired...the defendant appears to have been reared in a highly unstable home environment which was marked by parental marital difficulties, lack of parental displays of affection and concern, and the absence of appropriate role models and discipline." Later in the pre-sentencing report it is stated, "the defendant developed a severe emotional handicap suffering from rejection, depression and loneliness...the defendant may be desperate what he perceives to be an intolerable situation (his unstable life), however, he may become frustrated by his inability to do so, resulting in his involvement in criminal activity."

The results of my psychological evaluation conducted with Karl last December continue to demonstrate the presence of significant levels of depression and anxiety caused by the dysfunctional and abusive family environment.

Karl's self esteem is quite low and he regards himself poorly. He remains socially introverted, pessimistic and feels helpless about his situation and the events of his life. Standard measures of depression such as the Beck Depression Inventory and the Multiscore Depression Inventory and the Depressions Subscale of the Personality Assessment Inventory (PAI) consistently indicate severe levels of depression. For example, the Multiscore Depression Inventory nas a mean of 50T which a standard deviation of 10. Karl's total T score from depression was 90T, 4 standard deviations above the mean, indicating that he is in the upper 99th percentile in reporting depressive symptoms when compared to the general population. Similarly, Karl's depression subscore on the Personality Assessment Inventory was also 90T.

The psychological testing also indicated that Karl does not experience support from others and finds that others disappoint him or are not available to him. In addition, the world through Karl's eyes is hostile, depressing and indifferent. Karl feels isolated and out of touch with others. He experiences himself as being alienated and poorly understood. The evaluation, which are common psychological experiences to individuals who have been abused as children, indicated that Karl is not a reckless person, that he does not take needless risks nor does he put himself and others in danger. He avoids strong emotion and tries to remain calm. Karl's typical manner of dealing with frustrating or threatening situations is to remain stoic and outwardly unemotional. He does not freely express his hostility or anger nor does he make threats.

Karl's impulsivity, as a trait of his character, is demonstrated by his lack of control over his aggressive behavior when under extreme stress. He tends not to present with an angry attitude nor does he seem to be easily provoked by others. He demonstrates little insight into his own motivation and psychology. Karl is very submissive in social interactions and frequently subordinates his interest to those of others. He is prone to be mistreated and exploited by others.

Neither the current clinical interview nor information garnered from previous reports and interviews suggest a glib or insincere charm as would be indicative of a psychopathic personality. There is no evidence to suggest that Karl is overtly manipulative or conning. He does not use family members for money or personal gain, nor does he see others in terms of predator and prey. Karl is neither callous nor cynical and selfish.

With regard to a sense of remorse, there is no evidence to suggest that Karl harbors contempt for others. As he retold the events of the robbery and murder of January 7, 1982, Karl became upset. He tried to hide his face with hi hands. When he put his hand down from his face, he was tearful and distraught. He didn't say anything at the time. Later in the interview we went back to that moment and I asked Karl what he was thinking at the time. He said, "I don't know. I feel hurt for doing that. Every so often I think about it and feel those feelings. I did not want to hurt anyone, much less kill them." During another period in our interviews, near the conclusion, Karl commented, "I never beat up on a woman. Usually I enjoy conversations with women, but can't without feeling guilty about what happened with Dawn. I refrain (sic) myself. I just don't feel good about myself. No pleasure or joy. I look at myself; it reminds me of what happened. It makes me feel fucked up. How could I have done that to that man and woman?"

He has a positive history for early behavior problems including fire setting, truancy, robbery, theft, substance abuse, vandalism, and running away from home. The majority of Karl's crime and arrest record are for violations against property (vandalism, burglary, shoplifting, etc.) rather than persons.

Karl LaGrand's intellectual functioning falls in the average range, however, there remains a discrepancy between verbal and non-verbal problem solving such that verbal intelligence is significantly higher than non-verbal reasoning abilities.

Therefore, the documentation and contemporaneous evidence substantiate serious psychological impairment by the traumatic experiences of growing up in this environment.

OPINION: AS A RESULT OF BEING A VICTIM OF VIOLENCE HIMSELF, KARL LAGRAND FINDS HIS OWN VIOLENCE UNACCEPTABLE AND IT IS KEPT FROM CONSCIOUS AWARENESS. WHEN KARL LAGRAND EXPLODES INTO A VIOLENT RAGE HE CANNOT IDENTIFY THE ANTECEDENT CONDITIONS, NOR CAN HE PREDICT ITS OCCURRENCE, NOR DOES HE EXERT CONSCIOUS VOLITION OVER HIS ACTIONS. IT IS A RESPONSE THAT IS SEPARATE FROM HIS CONSCIOUS EXPERIENCE OF HIMSELF.

The reasons for this opinion are as follows:

My impression of the young Karl LaGrand from the records, reports and transcripts of testimony from those who knew him as a youngster, is he was an individual who responded well to environments which were predictable and caring. Teachers, counselors, probation officers, etc. who worked with Karl tended to like and trust him. Reports suggest a genuineness and trustworthiness about his character. The reports do not present him as an intractably oppositional or defiant youngster.

a. Karl's probation officer, Joseph Langlois, a probation officer for 22 years stated, "I trusted Karl." "I liked Karl an awful lot." Mr. Langlois describes Karl as a young man who could be controlled. Recollecting his experiences with Karl he stated, "Karl was more of a pacifist sort of." "I have never known Karl to even get involved in a fight."

b. An intake report for Vision Quest states, "Karl on the other hand seems very committed to receiving help and has been completely cooperative during his brief stay at Vision Quest... He shows signs of being a leader in the group home and is looking forward to some stability in his life."

c. Dr. Schorsch, Karl's psychiatrist at Vision Quest reported, "Karl has done exceedingly well...he was totally involved in the Vision Quest program including individual and group therapy...his relationships with his peers has markedly improved and he is well liked and respected."

d. The psychological report by Richard Dymeck, certified school psychologist indicates that Karl's response to group and individual treatment at YOU, "Reports from these therapy sessions indicated Karl has made excellent progress." This report further states that, "Despite the fact that Karl was targeted to go swimming in the afternoon (of the evaluation), he maintained a cooperative attitude with the psychologist and made every effort to do his best...he was extremely polite, prefacing his request with 'would you please'."

e. Dr. Jean Chambers' psychological report states that the results of the Jessness Inventory do not suggest delinquent proneness.

According to Karl, Weaver Barkman, one of the detectives who had interrogated him at the time of his arrest, testified that he thought Karl liked to kill. Karl took great exception to that statement. He said, "I'm not a killer. I went on a deer hunting trip with my foster father and one of his friends. Him, and a buddy and me. We had rifles. There's plenty of times I could have shot deer, but I didn't want to...I saw 2 or 3, but I let them go right past me. It's against everything that (I) stood for. Never abuse an animal."

During my clinical interviews with Karl, I asked about his anger. He said, "I don't get mad that easy. It takes a lot. When I do, people tend to move away." He said that if someone keeps putting pressure on him, and keeps badgering him, he doesn't get mad, "I just get tired of it. Basically, I let them know. I don't say it verbally, like I tell someone, 'Look I'm mad'."

Over the course of my three interviews with Karl, he told of three episodes in his life in which he became violent without premeditation. These stories were not told one after the other as they appear here, but rather were jogged from memory from time to time as we spoke of different subjects and times in his life. The common pattern in each of these accounts is the lack of emotion, the explosive and violence that took place, the lack of premeditation, threats, or warnings, the dissociative experience in which Karl LaGrand described his own reaction as unreal, being shocked, unaware, and surprised by his own actions. The stories are presented in chronological order as they relate to Karl's life from youngest to eldest.

Principal paddle story In the first account Karl describes being in elementary school in the 3rd and 4th grade. He became frustrated dong his work and threw his paper off the desk. The teacher asked "who do you think you are?" Karl answered, "Mr. Big Stuff" which was the title of a popular song at the time. The class laughed. The teacher took Karl to the principal's office. The principal took out a paddle. Karl remembers, "The secretary tried to hold me so I kicked her in the ankle and hurt her. The principal was getting ready to swing his paddle. I was pretty determined not to get hit. From what I was told, I attacked him and ran. I don't recall specifically, maybe I pushed him."

T-Square story: A second story was prompted when Karl was asked if he had ever been suspended from school, he said that he had and told the following story. "In junior high school I racked a guy with a T-Square in our drafting class. The guy was messing with me. I wasn't really mad I just went and did it. It was a dumb thing to do. The T-Square was hard plastic. The guy was pestering me all day. I don't recall what it was about. I was putting some stuff away and just out of the blue I put it between his legs and pulled up. And he went out." Asked what he was thinking before this happened, if he was angry, or had planned what he was going to do, he replied, "No, I didn't even respond. I didn't get mad or emotional. I just got tired of listening to it, and out of the blue just did it." Afterwards, the whole thing seemed like it was in slow motion. I guess I was even shocked I did it." Asked what he meant, Karl continued, "Shocked I even did the act. That's pretty stupid 'cuz I know how that hurts...it was like a flashback. I didn't know I was going to do it until it was done. I saw myself doing it, but didn't know it until the act happened. In other words, it wasn't like I was saying I'm going to go over and rack this guy like this."

JR and the Boxcutter story: The third story was disclosed in response to an inquiry his response of VERY TRUE when asked "Sometimes my temper explodes and I completely lose control." There a peer, Junior, who lived in the Barstow family's foster home with Karl. Karl and this boy were friends, in a manner of speaking. Karl remembered, "They called him 'J-R'. He would always ride me." When asked what JR would say, Karl replied, "I don't recall. I went overboard. I was determined and I went after him with a boxcutter. I didn't care about anything. I was running all over the place with the boxcutter in my hand (chasing JR) when the staff tackled me. It didn't even phase me. They couldn't even pry it out of my hand, I was so intense. That's the intensity of what goes off inside me. It's rare, but that's an example of what's inside me. Asked if he cut JR he said, "No, he was too fast. Glad I didn't. If I did catch him, I would have cut him." Asked what his sense of the episode was afterward, he responded, "I don't know. It was like looking at a whole different person. It couldn't have been me. If I can, I try to avoid any kind of confrontation or conflict." When asked if he was friends with JR after the incident, Karl said, "Yeah. He didn't mess with me, though. He was shocked. Me too."

There is striking consistency between my interviews with Karl nearly 11 years after the offense and the transcripts of the interrogation, confession and statements made in 1982. Also, the dissociative experiences Karl described when he became explosively violent as a youth, are remarkably similar to the incident of January 7, 1982. In the transcripts of the interrogation by Weaver Barkman, Karl states, "I wasn't me, goddamit it." Throughout the interrogation and at other times, Karl states clearly, "I didn't mean to do it." It is following this description that Karl says, "I wasn't me."

OPINION: KARL LAGRAND MADE HIS BEST EFFORT TO MINIMIZE THE LIKELIHOOD THAT ANYONE WOULD BE HARMED IN THE COMMISSION OF THIS ROBBERY.

The reasons for this opinion are as follows:

Regarding the violence committed in the commission of the bank robbery, Karl LaGrand has asserted from his earliest testimony immediately after his arrest, that he did not intend to harm anyone when he entered the bank. "I did everything I thought was necessary, that no one would get hurt, whether in the bank, myself, or my brother. That was the main goal. Other than getting the money and getting away. I'm no killer. 'Cuz I knew if I brought a real gun, someone would get killed, and no way was I going to take that chance."

The following is a compilation of steps and assumptions Karl LaGrand relied upon to minimize the risk of violence or harm:

a. He used a toy gun in the commission of the bank robbery. Asked why he chose a toy gun, Karl replied, "It was a bluff..." "I figured there was no need for a gun." "Only show a gun and there would be no problem." "The gun was a threat." I had a fake gun because I wanted to make sure no one got hurt."

b. His plan was to be convincing from the onset to minimize challenges. "I just figured if I was verbally convincing, they were not going to challenge me." "I did not take a weapon. I used finesse and bullshit to convince." (Why not take a real gun and bluff with that?) "I could have, but I felt no need for a real gun. I just needed to be convincing - and we were." "The bottom line, I didn't want anyone to get hurt. No weapons."

c. He reasoned that no one would fight for money that wasn't theirs and was insured. "I figured no one in his or her right mind is going to put their lives on the line for money that is not theirs. It's insured anyway."

d. He reasoned that if the bank employees realized they were in no danger, they would be much less inclined to confront or attack him or his brother.

e. They would be in and out of the bank quickly. "The bank was small and shouldn't be no trouble."

f. He tried to calm people when they appeared to panic to keep the situation in control. To his recollection, Karl says that he continued to say to Dawn, "Don't worry, calm down. We're going to leave. We're not going to hurt you. He added that during the robbery, "I was trying to maintain my calm. I didn't want my voice to be threatening."

g. Regarding the threats that were made, Karl stated, "Walter told him (Ken) if you don't get it" (the combination to the safe), he would be harmed. Karl demonstrated Walter putting a letter opener under Ken's chin.

OPINION: AS THE ROBBERY BEGAN TO FAIL, KARL LAGRAND RECOGNIZED THAT THE BANK EMPLOYEES WERE BECOMING AFRAID AND FEARING FOR THEIR LIVES. THIS WAS AN IMPORTANT AND SERIOUS TURN OF EVENTS IN KARL'S MIND. AT THIS JUNCTURE KARL, HIMSELF, BEGAN TO FEEL THREATENED AND PANICKED. WHAT FOLLOWED WAS UNEXPECTED GIVEN HIS EARLIER SAFEGUARDS AND OPPOSITE HIS CONSCIOUS INTENT.

The reasons for this opinion are as follows:

In describing the events that took place in the bank as the situation deteriorated, Karl descried his internal state saying, "I wasn't really calm. I was getting panicky, too...because of her (Dawn) making noise and shit." When I asked if he felt in danger, Karl responded, "I was scared. I don't know if danger, nothing in particular, just the whole thing. I just wanted to get out."

He recalled, "When he (Ken Hertsog) kicked, that was serious. In my mind it's not like I said, 'Oh, he kicked me'. In my minds' eye this guy's on top of me and I got to react."

In the transcript of the interrogation by Weaver Barkman, done shortly after the murder, Karl states, "He (Ken) kicked me in my left leg and I panicked." "She (Dawn) started screaming more and he started to try to kick more and I panicked and stabbed him." "She was screaming and hollering more and I stabbed her, I didn't want to do it, man, I panicked, they panicked." (Did you sense things coming to a peak in the bank?) "Not necessarily that it would explode like it did. I was just concentrating on calming her (Dawn), not thinking about anything else. The situation was not going our way. Frustration, tension, but not to the point that it would boil over to the point that it did. That was beyond anything I could imagine."

OPINION: AFTER REVIEWING THE COMPLETE TRANSCRIPTS OF THE SENTENCING HEARING OF SEPTEMBER 17, 1984 AND DECEMBER 12, 1984, IT IS MY OPINION THAT THE DETAILS OF THE MANY FORMS OF PSYCHOLOGICAL AND EMOTIONAL DISTRESS, INCLUDING KARL'S CHILDHOOD AND SDOLESCENSE, KARL'S DEPRESSION, HYPERVIGILANCE AND GENERAL PARANOIA, tHE DETAILS ARE INCOMPLETE.; THEREFORE, THE COURT WAS AT A DISADVANTAGE WITHOUT THIS IMPORTANT INFORMATION BEING UNDERREPRESENTED.

CONCLUSIONS:

1. Karl LaGrand's childhood was characterized by the traumatizing reality of verbal and physical abuse, emotional deprivation and parental indifference and apathy.

2. As a result of this family environment, Karl LaGrand's psychological development was ravaged and resulted in serious psychological impairments that are documented.

3. Karl LaGrand explodes into a violent rage of which he cannot identify the antecedent condition, nor can he predict its occurrence, nor does he exert conscious volition over his explosive rage reactions.

4. The murder was mitigated by Karl Lagrand's efforts to minimize the likelihood that anyone would be harmed in the

commission of the robbery.

5. The violence that occurred was unanticipated and opposite Karl LaGrand's conscious intent.

6. As a result of the circmstances which developed in the bank, including, the telephone call form the other bank employee, the need for a second combination, the unconsolable hysterical reaction by Ms. Lopez, Karl's recognition of the bank employees desperation and fear, Karl's volitional control was overwhelmed by panic.

7. Karl LaGrand does not have the ability to anticipate or control his violent reactions in stressful circumstances.

8. Karl LaGrand has fragile coping mechanisms, which fail under conditions of stress in highly charged emotional situations.

9. In order to develope and complete a thorough clinical evaluation of this type, it was necessary for me to meet with Karl LaGrand for ten contact hours over three sessions. It is my opinion that this is customary.

10. For Karl LaGrand, the events which preceded the stabbing in the manager's office exacerbated a defiecency in his psychological functioning, especially with regard to maining control of primitive impusles and under severe stress. this significantly impaired his ability to form a specific rational intent to harm, making this reaction in this circumstance beyond his volition and control.

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Further your affiant sayeth not.

Dated this 5th day of March, 1993.

PhD MSEd

Timothy J. Derning, Ph.D., M.S.Ed.
Licensed Clinical Psychologist

STATE OF CALIFORNIA)
) ss.
COUNTY OF ________)

On ______________________________ before me,

______________________, a Notary Public in and for said State, personally appeared, Timothy J. Derning, Ph.D., M.S.Ed., personally know to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknow

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Contra Costa

On 3/5/93 before me, Sherry Bennett, notary public
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared Timothy J. Derning.
NAME(S) OF SIGNER(S)

☐ personally known to me - OR - ☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

OFFICIAL SEAL
SHERRY BENNETT
My Comm. Expires June 9, 1993

WITNESS my hand and official seal.

Sherry Bennett
SIGNATURE OF NOTARY

OPTIONAL SECTION

CAPACITY CLAIMED BY SIGNER

Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

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☐ GUARDIAN/CONSERVATOR
☒ OTHER: Ph.D., M.S.Ed Licensed Clinical Psych

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)
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THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT

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NUMBER OF PAGES 30 DATE OF DOCUMENT 3/5/93
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Annex MG 47

CIRCULAR ORDER (RUNDERLAß) ON ASSISTANCE FOR GERMANS DETAINED ABROAD (15 OCTOBER 1998)

AUSWÄRTIGES AMT
Gz.: 511-531.45 Bonn, 15. Oktober 1998

An alle
diplomatischen und berufskonsularischen Vertretungen

Betr.: **Beistand für Untersuchungs- und Strafgefangene im Ausland**
Bezug: 1) Runderlaß 511-531.45 vom 26.10.1992 - RES 53/6 -
2) Runderlaß ASMR 320.21 vom 29.05.1998
Anlg.: - 2 -

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I.

1. Die Beschränkung der persönlichen Freiheit durch Verhaftung ist ein besonders schwerwiegender Eingriff in die Individualsphäre. Eine Verhaftung im Ausland wird in der Regel im Vergleich zum Inland zusätzliche Belastungen für die Betroffenen mit sich bringen, z.B. durch Verständigungsschwierigkeiten, ein fremdes Gesellschafts- und Rechtssystem und Unkenntnis der sonstigen örtlichen Bedingungen.

Der schnellen, sachgerechten und umfassenden Betreuung inhaftierter Deutscher durch die Auslandsvertretungen kommt daher besondere Bedeutung zu. Dies gilt unabhängig davon, aus welchen Gründen eine Inhaftierung erfolgt ist.

Die deutsche Öffentlichkeit wurde mit der im Frühjahr 1998 auch an die Auslandsvertretungen versandten Broschüre „Unser Konsulardienst - Hilfe und Service für den Bürger weltweit" über die von den Auslandsvertretungen geleistete Hilfe für inhaftierte Deutsche unterrichtet. Zu Recht erwartet der Bürger, daß die Auslandsvertretungen denjenigen Deutschen, die sich unter oft sehr schwierigen Bedingungen in Haft befinden, engagiert und einfühlsam konsularische Hilfe leisten.

2. Das am 15. Dezember 1974 in Kraft getretene Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) enthält in § 7 KG eine besondere Bestimmung über die Pflicht der Auslandsvertretungen, deutsche Untersuchungs- und Strafgefangene zu betreuen.

Die Verpflichtung zur Gewährung von Rechtsschutz im Sinne von § 7 KG steht in engem Sachzusammenhang unter anderem mit der Konvention zum Schutz der Menschenrechte und Grundfreiheiten vom 4. November 1950 (BGBl. 1952 II, 685) und dem WÜK (BGBl. 1963 II, 1585), insbesondere Art. 5, Buchst. e und Art. 36.

Für die Beurteilung der Behandlung von Verhafteten und der Haftbedingungen sind folgende Rechtsgrundlagen von besonderer Bedeutung:

- Internationaler Pakt vom 19.12.1966 über bürgerliche und politische Rechte (BGBl 1973 II 1533), insbesondere Art. 6-16,
- Übereinkommen vom 10.12.1984 gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe (BGBl 1990 II 246); das Folterverbot gilt als Grundsatz des allgemeinen Völkerrechts auch für Nichtvertragsstaaten dieses Übereinkommens,
- Übereinkommen über die Rechte des Kindes vom 20.11.1989 (BGBl 1992 II 121) insbesondere Artikel 37 und 40,
- ggf. die europäische Konvention zum Schutze der Menschen und Grundfreiheiten vom 04.11.1950 (BGBl 1952 II 685, 953), insbesondere Art. 5-7 und Europäisches

Übereinkommen vom 26.11.1987 zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe (BGBl 1989 II 946),

- Mindestgrundsätze der Vereinten Nationen für die Behandlung von Gefangenen (Entschließung des Wirtschafts- und Sozialrates der Vereinten Nationen 663 C I (XXIV) vom 31.07.1957). (Anlage 1),
- ggf. Europäische Strafvollzugsgrundsätze (Empfehlung der Ministerkomitees des Europarates R (87) 3 vom 12.02.1987). (Anlage 2)

II.

Eine Übersicht über die Maßnahmen, die aufgrund der §§ 1, 5 und 7 Konsulargesetz im einzelnen zu treffen sind, muß notgedrungen unvollständig bleiben, da die Verhältnisse in den Gastländern zu sehr voneinander abweichen. Für die meisten Länder dürfte jedoch vor allem folgendes von Bedeutung sein:

1. Die Pflicht zur Gefangenenbetreuung wird in §7 KG ausdrücklich von einem entsprechenden Verlangen der Gefangenen abhängig gemacht. Gleichwohl sollten die Auslandsvertretungen unabhängig von einem solchen Verlangen zunächst mit allen Deutschen Kontakt aufnehmen, von deren Verhaftung sie erfahren. Dies entspricht der allgemeinen Beistandspflicht gemäß §§ 1 und 5 (1) KG, denen gegenüber § 7 KG nicht als Spezialvorschrift mit Ausschließlichkeitscharakter, sondern als ergänzende Vorschrift betrachtet werden muß. Ohne eine solche zunächst von Amts wegen erfolgende Kontaktnahme würden deutsche Untersuchungs- oder Strafgefangene oft überhaupt keine Möglichkeit erhalten, ein Verlangen im Sinne von § 7 KG zu äußern. Die erste Fühlungnahme mit deutschen Gefangenen stellt insofern noch keine Betreuung im Sinne von § 7 KG dar. Weitere Maßnahmen im Interesse der Gefangenen sind dagegen von einer entsprechenden Willensäußerung der Betroffenen abhängig.

2. a) Nach dem Wortlaut des § 7 KG besteht eine Betreuungspflicht gegenüber deutschen Untersuchungs- und Strafgefangene. Eine am Zweck der Norm ausgerichtete Auslegung gebietet die Betreuung auch der Personen, denen anderweitig die Freiheit entzogen wird (z.B. durch Zwangseinweisung in geschlossene Heilanstalten).

   b) Der Betreuungsanspruch deutsch-ausländischer Doppelstaater besteht unabhängig von der weiteren Staatsangehörigkeit des Deutschen. Allerdings kann nach allgemein anerkannten Regeln des Völkerrechts ein Mehrstaater von jedem Heimatstaat ausschließlich als eigener Staatsangehöriger in Anspruch genommen werden. Insofern kann die Betreuung durch den Gaststaat eingeschränkt werden, wenn der Doppelstaater auch die Staatsangehörigkeit des Gaststaates besitzt.

c) Art. 20 (ex 8c) EG-Vertrag in Verbindung mit den Ratsbeschlüssen vom 19.12.1995 erstrecken die Pflicht zum konsularischen Schutz auf Bürger der Europäischen Union, die im Gastland keine Vertretung haben (s. insbesondere RE 513-350.36 vom 24.01.1996 sowie RE 502-350.34/1 Sbd 1/510-350.10/6 vom 28.05.1993 und RE 513-350 vom 15.06.1993). Zusätzlich zu der auch für Deutsche gebotenen Betreuung ist der Heimatstaat des Inhaftierten zu unterrichten, entweder über die Hauptstadt des Heimatstaates des Inhaftierten oder die nächstgelegene Auslandsvertretung.

d) Mit der Gewährung von Asyl in Deutschland ist auch eine Obhutspflicht verbunden. Auch wenn keine Betreuungspflicht nach § 7 KG besteht, kann im Einzelfall ein Tätigwerden der Auslandsvertretung nötig werden. Auf die Belange des Gastlandes, insbesondere mögliche Einwände, ist Rücksicht zu nehmen. Die Unterrichtung des örtlichen UNHCR-Büros kann angezeigt sein; insbesondere bei Einwänden der Gastregierung sollten dessen Vertreter um Übernahme der Betreuung gebeten werden.

3. a) Die Auslandsvertretungen sollten grundsätzlich sicherstellen, daß sie von der Verhaftung von Deutschen in ihrem Amtsbezirk unverzüglich benachrichtigt werden. Zu einer solchen Benachrichtigung sind die Behörden des Gastlandes gemäß Art. 36 (1) b WÜK zumindest dann verpflichtet, wenn die Verhafteten es verlangen.

b) Die Behörden des Gastlandes sind gemäß Art. 36 (1) c WÜK verpflichtet, zumindest den mit konsularischem Status ausgestatteten Angehörigen der Auslandsvertretung den Besuch von Verhafteten zu gestatten. In Art. 36 (1) c WÜK kommt ein allgemeiner Grundsatz des Völkergewohnheitsrechts zum Ausdruck, der auch nicht dem WÜK beigetretene Staaten verpflichtet.

4. a) Sobald eine Auslandsvertretung von der Verhaftung deutscher Staatsangehöriger in ihrem Amtsbezirk erfährt, sollte sie sich bei den zuständigen Behörden des Gastlandes nach dem Grund der Verhaftung erkundigen und sobald wie möglich mit den Verhafteten selbst Kontakt aufnehmen. Dies kann geschehen

- indem Angehörige der Vertretung die Verhafteten besuchen,

- indem eine Vertrauensperson der Vertretung (z.B. ein Rechtsanwalt, ein Seelsorger oder ein Mitglied des Hilfsvereins) gebeten wird, Verhaftete zu besuchen,

- fernmündlich oder schriftlich.

b) Bei dem ersten Kontakt mit Verhafteten sollte insbesondere geklärt werden:

- genaue Personalien (u.a. Namen, Staatsangehörigkeiten, Ausweise, Heimatanschrift; Namen, Telefon und Anschrift der nächsten Angehörigen),
- ob sie eine Betreuung durch die Auslandsvertretung wünschen (s.o. Abschnitt II Ziffer 1)
- ob sie die Gründe der Verhaftung kennen,
- ob Dolmetscher erforderlich sind,
- ob sie korrekt behandelt werden, insbesondere ob die international anerkannten Mindeststandards eingehalten und sie gegenüber Staatsangehörigen des Gaststaates nicht diskriminiert werden.
- ob ihre Gesundheit beeinträchtigt und ob ggfs. eine ärztliche Behandlung gewährleistet und angemessen ist,
- ob Verpflegung sowie Versorgung mit Kleidung und hygienischen Artikeln ausreichend sind,
- ob und ggf. welche Angehörigen benachrichtigt werden sollen (bei festgenommenen Minderjährigen sind in jedem Fall die nächsten Angehörigen zu benachrichtigen),
- ob der Verhaftete bereits über einen Anwalt verfügt (Name, Anschrift) oder ob die Vermittlung eines Strafverteidigers erwünscht wird.

c) Die Vertretung vergewissert sich, daß der Verhaftete seine Rechte nach dem örtlichen Recht kennt. Die entsprechenden Informationen können in einem Merkblatt (s.u. Abschnitt II, Ziffer 10 a)) enthalten sein, das gleichzeitig erklärt, was die Vertretung für den Inhaftierten unternehmen kann. Bei Rechtsauskünften sollte darauf hingewiesen werden, daß sie als erste Orientierung dienen und eine ausführliche Rechtsberatung durch einen mit den Normen des Gastlandes vertrauten Anwalt nicht ersetzen können. Weiterhin erscheint es zweckmäßig, die Verhafteten darauf hinzuweisen, daß sie ggf. verpflichtet sind, Leistungen und Auslagen zu erstatten (vgl. Abschnitt IV, Ziffer 2).

d) Die Unterrichtung von Angehörigen soll grundsätzlich direkt durch die Vertretung oder per Fernschreiben über das BKA Wiesbaden mit der Bitte um Befassung der zuständigen örtlichen Polizeidienststelle erfolgen.
Eine regelmäßige Pflege der Kontakte zu Angehörigen kann angezeigt sein, z.B. wenn der Inhaftierte ernste gesundheitliche Probleme hat oder kein Verteidiger vorhanden ist, der sie über die Entwicklung des Verfahrens unterrichtet. Allerdings sollten auch die Angehörigen ausführlich über die Möglichkeiten und die Aufgaben der Vertretungen unterrichtet werden, da hier zuweilen falsche Vorstellungen bestehen.
Zum Schutz der Persönlichkeitsrechte der Inhaftierten sollten Anfragen zu Einzelheiten der Haftfälle grundsätzlich nur im einvernehmen mit den Betroffenen beantwortet werden.

e) Sofern andere Überweisungsmöglichkeiten ausscheiden, können Geldüberweisungen für Inhaftierte über die Legationskasse des Auswärtigen Amtes (Konto-Nr. 38001025 bei der Landeszentralbank Bonn, BLZ 380 000 00) erfolgen. Die Überweisung muß den Verwendungszweck (z.B. „Haftfall N.N.") und den Dienstort enthalten.

f) Die Vertrauensbasis zwischen der Botschaft und den länger Inhaftierten wird häufig durch kleine Betreuungsmaßnahmen wie das Mitbringen von Lesematerial und Dingen des Lebensbedarfes verbessert. Die besonderen Verhältnisse des Gastlandes können eine regelmäßige Unterstützung erforderlich machen.
Ist absehbar, daß der Inhaftierte über einen Zeitraum von zwei Monaten hinaus finanzielle Unterstützung für den zum Leben unbedingt notwendigen Bedarf benötigt, ist zu erwägen, ob ihm ein Antrag auf Sozialhilfe für Deutsche im Ausland nahegelegt werden sollte (s. RE 513-542.10 vom 18.01.1995 - RES 54/4, Ziffern 3.2.3, 4.3 und 5.4.1.4 sowie Dienstanweisung "Hilfe für Deutsche im Ausland" 513-542.15 vom 04.02.1994 - RES 54/30, Ziffern 2.9 und 5.5). Für eine notwendige finanzielle Unterstützung, die zwei Monate nicht überschreitet, sind Leistungen nach § 5 KG zu gewähren.

Auf die Möglichkeit einer kleinen finanziellen Zuwendung des Deutschen Roten Kreuzes zu Weihnachten für länger Inhaftierte in Mittel-, Ost- und Südosteuropa wird hingewiesen. Anträge sollten unter kurzer Schilderung des Falles von der Vertretung unmittelbar an das DRK gerichtet werden (Deutsches Rotes Kreuz, Suchdienst Hamburg, Postfach 306123, 20327 Hamburg).

5. Falls Verhaftete die Vermittlung eines Verteidigers wünschen, sind ihnen nach Möglichkeit geeignete und vertrauenswürdige Rechtsanwälte zu benennen. Hierbei ist darauf hinzuweisen, daß die Auslandsvertretungen keine Garantie für die Arbeit der Anwälte übernehmen können („ohne Gewähr") und ein Auftragsverhältnis nur zwischen Verhaftetem und Anwalt besteht.

Gegebenenfalls ist auch dafür Sorge zu tragen, daß für die Verständigung zwischen den Verhafteten und ihren Verteidigern ein Dolmetscher zur Verfügung steht.

Sofern die Verhafteten selbst oder ihre Angehörigen nicht auf Vermittlung eines Wahlverteidigers sowie evtl. auch eines freigewählten Dolmetschers Wert legen und die damit meist erforderlich werdenden Honorarvorschüsse leisten, ist nach Möglichkeit auf die Bestellung eines Pflichtverteidigers und evtl. auch den Einsatz eines vom Gastland bezahlten Dolmetschers hinzuwirken.

Nur subsidiär und vorbehaltlich der einzuholenden Zustimmung des Auswärtigen Amts kann für notwendige Rechtsschutzkosten eine Hilfe nach § 5 KG in Betracht kommen, falls die in RES 54/30 unter Ziffer 5.7 aufgeführten Voraussetzungen gegeben sind.

6. Die Teilnahme an Gerichtsterminen kann aufgrund der besonderen Verhältnisse im Gastland oder der Bedeutung des Falles geboten sein. An der Hauptverhandlung sollten Angehörige oder Beauftragte der zuständigen Auslandsvertretung nach Möglichkeit zumindest dann beobachtend teilnehmen, wenn zu befürchten ist, daß die den Schutz des Angeklagten bezweckenden Vorschriften nicht eingehalten werden, oder wenn an dem Verfahren aus anderen Gründen ein erhöhtes Interesse besteht.

7. Befinden sich Deutsche aufgrund eines deutschen Fahndungs- - oder Auslieferungsersuchens in Haft - siehe hierzu RES 53/16 betr. „Auslieferungs- und sonstiger Rechtshilfeverkehr in Strafsachen mit dem Ausland" (i.d.F. vom 20.10.92) -, besteht ebenfalls eine Verpflichtung zur konsularischen Betreuung, sofern die Inhaftierten es wünschen. Auf korrekte Behandlung der Inhaftierten durch die Behörden des Gastlandes ist ebenso zu achten wie auf eine beschleunigte Durchführung des Auslieferungsverfahrens.

8. a) Werden betreute Untersuchungs- oder Strafgefangene nicht korrekt behandelt oder drohen gesundheitliche Schäden, so prüfen die Vertretungen, welche Maßnahmen sie zur Behebung der Mißstände ergreifen können. Bei Gefahr im Verzuge sollten die Auslandsvertretungen unverzüglich bei den zuständigen Stellen des Gastlandes vorstellig werden, unabhängig von möglichen Schritten der Verteidiger. Da Beanstandungen der Haftbedingungen zu Vergeltungsmaßnahmen gegen die Gefangenen führen könnten, empfiehlt es sich jedoch, deren Zustimmung einzuholen.

Wenn deutsche Inhaftierte Menschenrechtsverletzungen ausgesetzt sind, soll die Vertretung gegenüber den zuständigen Behörden des Gastlandes gegen die Menschenrechtsverletzung protestieren und auf die umgehende Abstellung der rechtswidrigen Behandlung der Deutschen drängen. Demarchen auf Regierungsebene sollten mit dem Auswärtigen Amt abgestimmt werden.

b) Die Vertretungen sollten auch darauf achten, daß Aburteilungen innerhalb einer angemessenen Frist erfolgen bzw. daß die Dauer der Untersuchungshaft angesichts der zu erwartenden Strafe verhältnismäßig bleibt.

9. Die Auslandsvertretungen sollen die Stellung von Sicherheitsleistungen (Kautionen) im Rahmen des Möglichen fördern. Dazu können Angehörige und Freunde im Heimatland kontaktiert werden. Auslandsvertretungen können ferner als Mittler bei der Weiterleitung von Kautionen fungieren. Eine Übernahme dieser Kosten im Rahmen einer Hilfe nach § 5 KG ist allerdings grundsätzlich nicht möglich. In Ausnahmefällen (akute Gefahr für Leib und Leben) ist zu berichten (s. RES 54/30 Ziffer 5.7).

10. a) Es wird den Auslandsvertretungen empfohlen, nach Bedarf Merkblätter zu entwickeln und auszugeben, die den Inhaftierten in allgemeiner Form über seine Rechte unterrichten und sonstige für ihn wissenswerte Informationen enthalten. Diese Merkblätter sind ständig zu aktualisieren. Sie sollten mit anderen deutschen Vertretungen im Gastland und, wo angebracht, im EU-Kreise abgestimmt sein.

b) Inhaftierte und deren Angehörige neigen nicht selten dazu, die Vertretungen für schwierige Verhältnisse mitverantwortlich zu machen. Es ist daher - insbesondere bei längeren Haftfällen - dringend zu empfehlen, alle Tätigkeiten der Vertretung schriftlich festzuhalten, um bei möglicher Kritik reagieren zu können.

c) Die Vertretungen, in deren Amtsbezirk sich regelmäßig mehr als fünf betreute Untersuchungs- oder Strafgefangene befinden, sollten eine Liste der Untersuchungs- und Strafgefangenen führen. Diese Liste sollte Namen, Geburtsdatum, Staatsangehörigkeit, Verhaftungsdatum, Strafvorwurf, Datum, Rechtskraft und Strafmaß der Verurteilung, die Strafvollzugsanstalt, das befaßte Gericht, den Verfahrensstand und die Geschäftszeichen, unter denen der Haftfall beim Gericht, bei der Vertretung und ggf. der Haftanstalt und der Staatsanwaltschaft geführt wird, Anwalt mit Kontaktadresse sowie die Haftbesuche umfassen. Die Listen sollten ständig aktualisiert werden. Zur Vorlage der Listen werden ggf. Einzelweisungen ergehen.

11. Die Auslandsvertretung sollte geeignete Einzelpersonen, (z.B. Geistliche, Sozialhelfer) oder Gefangenenhilfsvereine bitten, sich an der Gefangenenbetreuung zu beteiligen. Die Arbeit dieser freiwilligen Helfer sollte von den Vertretungen nach Kräften unterstützt und regelmäßig (z.B. im Rahmen von Einladungen) gewürdigt werden. Die Häftlingsbetreuung durch freiwillige Helfer kann aber nur eine willkommene Ergänzung sein. Die Verantwortung der Vertretung bleibt unberührt.

12. Was Auskünfte an die Presse über Verhaftungen von deutschen Staatsangehörigen betrifft, so wird auf die allgemeinen Runderlasse des Pressereferates verwiesen.

III.

1. Über Inhaftierung von Deutschen ist umgehend zu berichten, wenn Grund zu der Annahme besteht, daß das Auswärtige Amt befaßt werden wird oder daß die Presse den Fall aufgreift. Zu berichten ist auch bei Menschenrechtsverletzungen (s.o. Abschnitt II, Ziffer 8a, die Beteiligung des ASMR sollte im Bericht angeregt werden) und wenn ganze Gruppen von Deutschen verhaftet werden (z.B. Demonstranten).

Auch über ander politisch gewichtige Haftfälle soll jeweils umgehend berichtet werden, z.B. über Verhaftung von deutschen Journalisten oder von Personen, die sich im amtlichen Auftrag im Ausland aufhalten (Entwicklungshelfer, Kulturschaffende).

2. **Über die Haftentlassung deutscher Untersuchungs- oder Strafgefangener ist zu berichten, falls zuvor über ihre Verhaftung berichtet worden ist.**

3. **Die gemäß Bezugs-Runderlaß zu 2. von ausgewählten Vertretungen dem ASMR vorzulegenden Menschenrechtsjahresberichts werden immer dann von ASMR im Doppel an Referat 511 weitergeleitet, wenn sie Aussagen zu Folter, unmenschlicher Behandlung, Haftbedingungen, Verhängung und Vollzug der Todesstrafe, Verletzungen von Verfahrensgarantien im Strafverfahren oder politischen Straftaten enthalten.**

4. **Die Berichterstattung über die Verurteilung und Straftaten Deutscher regelt sich außerdem nach RES 53/14 (i.d.F. vom 15.03.1996).**

5. **Für Personen, die im Deutschen Fahndungsbuch ausgeschrieben sind, gilt RES 53/7 (i.d.F. vom 26.06.1998).**

IV.

Die Erstattung von Geldleistungen **gemäß** Abschnitt II Ziffer 5 oder 9 sowie die Vergütung von Sachleistungen, die deutschen Untersuchungs- oder Strafgefangenen gewährt worden sind, regeln sich nach § 5 Abs. 5 Konsulargesetz und § 7 Abs. 1 AKostG (siehe auch Runderlaß RES 54/30).

Im einzelnen gilt folgendes:

1. Die Tätigkeit der Auslandsvertretungen im Rahmen der **notwendigen** Betreuung gem. § 7 KG von Untersuchungs- und Strafgefangenen ist **gebühren- und auslagenfrei**. Zu der notwendigen Betreuung zählt insbesondere die erste Kontaktnahme (s.o. Abschnit II, Ziff. 1), bei der es unerheblich ist, ob ein Antrag des Inhaftierten vorliegt oder nicht, weil die Vertretung eine von Amts wegen bestehende Pflicht erfüllt. Im weiteren Verlauf der Häftlingsbetreuung ist für die Kostenfrage abzuwägen, ob ein übergeordnetes Interesse der Allgemeinheit vorliegt oder lediglich ein individueller Wunsch des Inhaftierten. Ein übergeordnetes Interesse der Allgemeinheit ist in der Regel anzunehmenwenn wenn besonders schwierige Haftbedingungen vorliegen, bei Haftbesuchen und Betreuungsmaßnahmen auf gesonderte Weisung des Auswärtigen Amtes und bei Maßnahmen der Vertretungen bei Menschenrechtsverletzungen. Auch in diesen Fällen gilt Gebühren- und Auslagenbefreiung.

2. Nach § 5 Abs. 5 Konsulargesetz und § 7 Abs. 1 AKostG sind grundsätzlich alle Auslagen zu erstatten, die für die Betreuung auf Antrag des Gefangenen entstehen, also sowohl Auslagen, die die Auslandsvertretungen an Dritte leisten (z.B. Kauf von Lebensmitteln, Kleidung oder anderen Gegenständen, Porto bei Aufgabe von Post, Telefonate) , als auch diejenigen, die den Vertretungen selbst entstehen (z.B. Fahrtkosten durch besonders häufige und den Umständen nach nicht notwendige Haftbesuche auf ausdrücklichen Wunsch des Häftlings).

   Die Nutzung des amtlichen Weges über die Legationskasse für Überweisungen ist kostenlos, ebenfalls die Weiterleitung des Geldes an die Inhaftierten.

   Soweit für Auslagen ein Darlehen gem. § 5 KG gewährt wird, ist die Gewährung der Hilfe gebührenfrei. Die Gewährung eines Darlehens für die Heimreise nach Entlassung aus der Haft gehört nicht mehr zu Gefangenenbetreuung, die Gewährung ist gebührenpflichtig.

   Fernschreib-, Telefon-, Paßgebühren u.a., die im Zusammenhang mit einer Hilfe nach § 5 KG entstehen, sind in die Hilfe einzubeziehen und nicht mit gesonderter Kostenrechnung anzufordern.

3. Unter den Voraussetzungen von § 10 Abs. 1 und 3 AKostG kann von der Erhebung der Kosten ganz oder teilweise abgesehen werden.

4 Die Vertretungen sollten gegebene Möglichkeiten zur Kosteneinsparung nutzen und im Rahmen der ersten Kontaktnahme mit einem Häftling, (s.o. Abschnitt II Ziffer 1) soweit möglich auch Besuche bei anderen Deutschen durchführen, die in der gleichen oder einer benachbarten Anstalt inhaftiert sind. Dabei entstehende geringfügige Mehrkosten können ebenfalls auf amtliche Mittel übernommen werden.

   Insbesondere in größeren Flächenstaaten sind Dienstreisen aus anderen Anlässen auch zu nutzen, um Häftlinge vor Ort zu betreuen.

5. Auslagen, die erst nach Rückkehr des Kostenschuldners (§ 13 AKostG) in die Bundesrepublik Deutschland zur Erstattung angefordert werden können, sind mit Kostenrechnung anzufordern. Nimmt der Kostenschuldner in einem anderen Land Wohnsitz, sind die Auslagen durch die für den Wohnsitz des Schuldners zuständige Auslandsvertretung einzuziehen. Auf die Möglichkeit des § 16 AKostG wird hingewiesen.

6. Ist die inhaftierte Person zur Zahlung eines Vorschusses auf die zu erwartenden Kosten oder einer Sicherheitsleistung hierfür nicht in der Lage und können auch Familienangehörige die Kosten nicht vorfinanzieren, so empfiehlt sich in der Regel eine Verpflichtungserklärung. Wurde eine solche abgegeben, ist diese anläßlich der Übersendung der Kostenrechnung dem Bundesverwaltungsamt vorzulegen.

7. Soweit sonst noch Auslagen entstehen, ist gemäß RES 54/30 (i.d.F. vom 04.02.1994 513-542.15) zu verfahren.

V.

- Datenschutz -

Soweit die Betreuung inhaftierter Deutscher auf Grundlage des Konsulargesetzes die Erhebung, Verarbeitung (wozu auch die Datenübermittlung gehört) oder Nutzung personenbezogener Daten durch die Auslandsvertretung erforderlich macht, hat dies unter Beachtung der einschlägigen Vorschriften (insbes. §§ 13 ff) des Bundesdatenschutzgesetzes (BDSG) zu erfolgen. Auf den Runderlaß des Datenschutzbeauftragten des Auswärtigen Amts vom 15.6.1991 - 110-3-204.02/32 - (RES 20/81) wird in diesem Zusammenhang hingewiesen. Sollte eine Auslandsvertretung eine Datei mit den personenbezogenen Daten der im Gastland Inhaftierten führen, so ist diese Datei dem Datenschutzbeauftragten des Auswärtigen Amtes mit der jährlichen Dateimeldung mitzuteilen. Dasselbe gilt für die gemäß Abschnitt II, Ziffer 10 c) zu erstellende Haftliste.

VI.

Dieser Runderlaß ist allen (auch nur vertretungsweise) mit RK-Angelegenheiten befaßten Bediensteten bei ihrem Dienstantritt sowie danach jährlich nachweislich bekanntzugeben.

Der Bezugserlaß zu 1. vom 26.10.1992 wird aufgehoben; der vorliegende Runderlaß wird an seiner Stelle unter RES 53/6 in die RES aufgenommen.

Im Auftrag

Anlage 1
Gz.: 511-531.41
RE vom 15.10.1998

Standard Minimum Rules For The Treatment Of Prisoners and

Translation

Re: Support for Germans remanded in custody pending trial or serving a prison sentence abroad

I. Introduction

1. What it means for diplomatic missions abroad to care for Germans serving a prison sentence

2. Legal basis

II. Measures to be taken

1. Duty to establish contact

4. Measures to be taken in caring for prisoners

  (a) ways in which contact may be established

  (b) the first contact

  (c) informing the prisoner of his/her rights

  (d) informing the prisoner's family and friends, as well as third parties

  (e) transferring money

  (f) assistance for living expenses, Christmas donations

5. Putting prisoners into contact with lawyers/interpreters, court-appointed counsels for the defence

6. Attending court hearings

I.

1. Arrest represents a particularly severe encroachment on a person's individual freedom. If the arrest takes place abroad, the detainee usually experiences additional difficulties to those he or she would have experienced in Germany, for example, due to communication difficulties, an unfamiliar social and legal system and lack of knowledge of other local conditions.

It is therefore extremely important that Germans under arrest abroad are provided with fast, professional all-round support by German diplomatic missions abroad, regardless of the reasons for the arrest.

A brochure entitled "Unser Konsulardienst - Hilfe und Service für den Bürger weltweit" (Our consular service - help and service for citizens world-wide) was issued in spring 1998 to inform the German public of the assistance provided for Germans under arrest by German diplomatic missions abroad. The publication has also been sent to the German diplomatic missions abroad. The citizen has every right to expect missions to provide committed, sympathetic consular assistance for those Germans finding themselves under arrest, often in very difficult circumstances.

II.

Since there are great variations in the conditions in different host countries, it is inevitable that an overview of the measures to be taken pursuant to Sections 1, 5 and 7 of the Consular Law cannot be exhaustive. However, the following guidelines are relevant for most countries:

1. Section 7 of the Consular Law states explicitly that the duty to attend to prisoners is dependent on the prisoner making a request to that effect. German diplomatic missions abroad should nevertheless establish contact with any Germans of whose arrest they are informed. This is in line with their general obligation to provide support pursuant to Sections 1 and 5 (1) of the Consular Law; Section 7 of the Consular Law for its part, is not to be regarded as a special, exclusive regulation, but rather as a complementary provision. Unless contact is established through official channels, Germans committed to custody pending trial or to prison would often have no opportunity to make a request as defined in Section 7 of the Consular Law. The first consultation does not therefore represent support as defined in Section 7 of the Consular Law. Any further measures in the interests of the detainee are, however, subject to his/her manifestation of will.

4. (a) As soon as a German diplomatic mission abroad has received information of the arrest of a German citizen in its consular district, it should ask the competent authority in the host country as to the reason for the arrest and establish contact with the detainee at the earliest possible opportunity. Contact may be made in one of the following ways:

- **members of the diplomatic mission visit the detainee,**
- **a person appointed by the diplomatic mission (e.g. a lawyer, a pastor, or a member of a charitable organization) is requested to visit the detainee,**
- **by telephone or by letter.**

(b) The initial contact with detainees should clarify the following:

- **exact personal data (*inter alia* name, nationalities, identity documents and home address as well as the name, telephone number and address of close relatives),**
- **whether they would like to be attended to by the German diplomatic mission abroad (see above, section II 1),**
- **if they know the reasons for their arrest,**
- **if they require interpreters,**
- **if they have been treated properly, particularly if internationally recognized minimum standards have been adhered to and if they have suffered discrimination in comparison with citizens of the host country,**
- **if their health has suffered, if medical treatment has been given, and, if so, if it was appropriate,**
- **if they have been provided with sufficient clothing and toiletries,**
- **if any family members should be informed, and if so, who (in the case of detained minors the closest relatives must be informed),**

- if they have already appointed a lawyer (name, address) or would like to be put in touch with a counsel for the defence.

(c) The diplomatic mission should ensure that the detainee is aware of his/her rights under local legislation. Such information may be in the form of a leaflet which also explains what the German diplomatic mission can do for the detainee. Any legal information should be provided with the proviso that it is intended to serve as an initial orientation and cannot substitute the detailed legal advice of a lawyer who is familier with the usual practice in the host country. It is also expedient to point out to detainees that they may be required to repay any outlays made on their behalf.

(d) Diplomatic missions should inform members of detainees' families directly, or in a telex via the Federal Criminal Police Office in Wiesbaden, requesting that the local police station take charge of this task.
Regular contact to members of a detainee's family may be appropriate, e.g. if the detainee has serious health problems or there is no defence lawyer who can inform them of the proceedings. However, relatives should also be informed in detail of the scope and tasks of the diplomatic missions, as their expectations are often unrealistic.
In order to protect the detainee's privacy, answers may only be given to enquiries concerning details of the arrest with the agreement of the person concerned.

(e) If money cannot be transferred by any other means, the following Federal Foreign Office account may be used for this purpose (account number 38001025, Landeszentralbank Bonn, sort code 380 000 00). The transfer form must state the purpose of the payment (e.g. "payment on behalf of + name of prisoner") as well as stating which diplomatic mission is attending to the detainee.

(f) Trust is often built up between an Embassy and long-term detainees through the provision of reading material or essential items. The conditions in the host country may be such that regular support is required.

If it is likely that the detainee will require financial support for essential items for more than two months, it should be considered whether he/she should be encouraged to submit an application for social assistance for Germans abroad (see RE [circular] 513-542.10 of 18 January 1995, RES [collection of circulars] 54/4, items 3.2.3, 4.3 and 5.4.1.4 as well as service instructions on assistance for Germans abroad "Hilfe für Deutsche im Ausland" 513-542.15 of 4 February 1994 - RES [collection of circulars] 54/30 items 2.9 and 5.5). For periods of under two months essential financial support shall be made through payments under Section 5 of the Consular Law.

The German Red Cross can also provide a small Christmas contribution for long-term detainees in Central, Eastern and South-Eastern Europe. Diplomatic missions should submit applications directly to the German Red Cross, (Deutsches Rotes Kreuz, Suchdienst Hamburg, Postfach 306123, 20327 Hamburg), enclosing an outline of the circumstances of the case.

5. If the detainees request to be put in contact with a defence lawyer they should, if possible, be given the names of suitable and reliable lawyers. It should be made clear to the detainee, however, that the diplomatic missions cannot be made liable for the lawyers' work ("no responsibility taken") and that any contractual relationship is between the detainee and the lawyer only.

An interpreter should be made available if required so that detainees are able to communicate with their defence lawyers.

If neither the detainees nor their families place any value on selecting a defence counsel or an interpreter themselves, which usually involves advance payment of the fee, efforts should be made to ensure that a counsel for the defence is appointed by the court, and if necessary, an interpreter, paid for by the host country, is also assigned.

Only as a last resort subject to the approval of the Federal Foreign Office can assistance for essential legal protection costs be granted under Section 5 of the Consular Law, and only if the conditions listed under RES 54/30 item 5.7 are met.

6. It may be advisable, due to the special circumstances in the host country or the significance of the case, to attend court hearings. Members of the competent German diplomatic mission abroad or persons commissioned by the diplomatic mission should, if possible, at least attend to observe the proceedings if it is to be feared that the regulations for the protection of the accused are not adhered to or if the case attracts a high level of interest for other reasons.

It is hereby certified that the above is a true and accurate translation from the German into the English language

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Annex MG 48

SUPREME COURT OF THE UNITED STATES,
PARAGUAY V. *GILMORE*,
BRIEF OF *AMICI CURIAE* ARGENTINA, BRAZIL, ECUADOR AND MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI
(26 MARCH 1998)

No. 97-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of
Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General
of the Republic of Paraguay to the United States,
Petitioners.

— v. —

JAMES S. GILMORE III, Governor
of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE REPUBLIC OF ARGENTINA, REPUBLIC OF BRAZIL, REPUBLIC OF ECUADOR, AND REPUBLIC OF MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Dated: March 26, 1998

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I.

INTEREST OF AMICI CURIAE

Amici nations[1] have a vital interest in ensuring compliance with the Vienna Convention on Consular Relations[2] by the United States and its political subdivisions. The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign nation has always been a critical function of consular officials. Thousands of nationals of amici nations travel to the United States each year or reside in this country, and it is incumbent on the consular officials of amici nations to assist and protect those that become involved with the criminal justice system here. Consuls can discharge that responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions. Those functions can include addressing appropriate authorities on behalf of the detained national, assisting in discovery and collection of mitigating evidence, monitoring of proceedings and incarceration, and advising detained nationals about the United States justice system and differences between that system and the justice system in the accused's country of origin

The United States is the only Western industrialized nation that still imposes the death penalty.[3] Because of the severity of the potential punishment, a consul has a special interest in assisting a national who faces a capital charge. The failure of law enforcement officials in the United States to comply with Article 36's consular notification provision eviscerates consuls' right to assist, protect, and ensure the fair treatment of their nationals. Indeed, the case of Angel Breard, from which the instant action by Paraguay arises, is by no means unique. In several other capital cases, a foreign state or national has raised the issue of non-compliance with the Vienna Convention in the federal courts.[4] Courts, while recognizing the existence of recurring violations of the Vienna Convention, have considered themselves unable to grant relief.

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[1] Pursuant to the disclosure requirement of Rule 37.6 of the Rules of this Court, Amici make the following disclosures: This Brief was not authored in whole or in part by counsel for any party, and no monetary contribution to the preparation or submission of the Brief was made by any person or entity other than Amici or their counsel.

[2] April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77 [hereinafter "Vienna Convention," "Convention," or "VCCR"]

[3] *See* Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries*, at 5 (1996).

Thus, amici nations have a vital interest in persuading this Court to hear Paraguay's case.[5] A decision by this Court would establish a nationwide precedent that would extend beyond the particular action to every instance in which authorities arrest a foreign national. Further, as the United State has itself recognized, the continuing vitality of the Vienna Convention depends upon reciprocity of enforcement between foreign nations. Thus, the resolution of this case will have a direct effect on each amicus nation. In the absence of a decision by this Court, violations of the Vienna Convention will continue unabated and amici nations will be denied their rights under United States and international law.[6]

II.
RESERVATION OF IMMUNITY

Nothing in this Brief shall be construed as a waiver of the immunity to which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico is entitled by virtue of International law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, any immunity or privilege established by the Vienna Convention or of any defense, right, or immunity which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico may have a right to assert. It also shall not imply a submission to the jurisdiction of the United States by the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico.

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[4] For examples of capital cases in which the issue of non-compliance with the Vienna Convention has arisen, *see, e.g.*, *United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997) (Arizona); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (Virginia); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (Texas).

[5] Because of the substantial importance it attaches to consular notification, the Republic of Mexico has requested an advisory opinion before the Inter-American Court of Human Rights of the Organization of American States on this issue.

[6] Argentina's interest in this action is based not only on the respect that all states owe to the Vienna Convention, but also upon the fact that Mr. Breard was born in Argentina and is of Argentine origin.

III.

STATEMENT OF CONSENT OF PARTIES

The written consents of Petitioner and Respondents to the filing of this Brief of Amicus Curiae are filed concurrently and attached hereto.

IV.

SUMMARY OF ARGUMENT

The Vienna Convention plays a vital role in the protection and fair treatment of foreign nationals present in another state by requiring, among other things, that arresting authorities promptly notify a foreign national of his or her right to contact a consular official. The right to contact a consular official is a critical one, as the United States has repeatedly recognized in actions and statements by the Departments of State and Justice. In fact, the United States is one of the most vociferous advocates of the Convention and insists upon strict compliance with it when an American is detained abroad. However, the viability of the Vienna Convention depends on reciprocal compliance by signatory states. Failure to comply by one nation imperils the entire structure established by the Convention. By failing to inform arrested foreign nationals of their rights, officials of Virginia and other states have imperiled the continuing viability of the Vienna Convention.

Adherence to the Vienna Convention ensures that consuls can continue to provide substantial and meaningful assistance to their nationals. That assistance can include addressing local authorities on behalf of an accused national, assistance in the dealings with local authorities" and "to represent Mexicans who are absent or otherwise incapable of handling their own affairs." Lee, *supra*, at 127 (quoting *Ley Organica del Servicio Exterior Mexicano y su Reglamento*, Art. 88).

Monitoring Proceedings and Incarceration: Consuls also can play an essential role in monitoring proceedings against the national to ensure fairness and compliance with international standards and monitor the pre- and post-trial conditions of incarceration. For example, the United States requires its consuls to monitor the well being of incarcerated American citizens, protest discrimination against detained citizens, and attend the trial of any American, even in the absence of discrimination, *see* Lee, *supra*, at 169-71 (quoting Dep't. of State, *Consular Instructions* 421.3, 431.2, 431.3), and the United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prima-facie miscarriage or denial of justice" or "the futility of appeal to a higher authority." Lee, *supra*, at 125 (quoting *United Kingdom Foreign Service Instructions* VIII-16 (vi)). Consuls cannot perform the monitoring function unless they know of the proceedings against a national. In most cases, they will become aware of those proceedings only when the Vienna Convention is complied with by authorities of the Receiving State.

Moreover, the monitoring function does not exist simply to provide comfort or reassurance to the accused foreign national. Rather, it increases the chances that the defendant will receive a truly fair trial. The possibility of discrimination is substantial in a proceeding against a foreign national, especially in a capital cases. *See* Shank & Quigley, *supra*, at 741. Consular monitoring and presence during the course of proceedings can reduce the possibility of discrimination. *See id.* at 744. Thus, an accused foreign national can suffer substantial harm, in the form of discrimination, when a consul is not monitoring the proceedings. That harm is suffered in every case where authorities fail to comply with the Vienna Convention, because those cases will not have any monitoring of the proceedings to ensure the absence of discrimination.

VI.
CONCLUSION

As the United States has itself emphasized, the continuing vitality of the Vienna Convention depends upon reciprocity among its signatories. Therefore, violations of Article 36 by state officials undermine treaty provisions that form a cornerstone of consular relations and that are essential to the fair treatment both of foreign nationals detained in this country and of United States citizens who are detained abroad. Yet in the face of an admitted violation of Article 36, committed in the gravest of cases — one in which a political subdivision of the United States seeks to put a foreign national to death — the Fourth Circuit has ruled that it can afford no relief either to the accused or to Paraguay, his nation of origin.

Because violations of Article 36's notice provisions typically come to light only after an accused has been convicted and sentenced — as did the violation here — the Fourth Circuit's interpretation of the Eleventh Amendment means that federal courts will virtually always be powerless to remedy Article 36 violations. Yet it is to the federal courts that sovereign nations must be able to turn effectively to redress violations of their rights under Article 36. No less a document than the United States Constitution charges the federal courts with the responsibility for such cases. *See* U.S. Const., Art. 3, § 2 (judicial power of federal courts extends to cases arising under United States' treaties); *see also* 28 U.S.C. § 1331 (same). While foreign sovereigns might choose to bring state court actions to redress violations of the Vienna Convention, it would be an odd result indeed if foreign nations — complaining of the violation of rights arising under a treaty ratified by the President with the advice and consent of the Senate, enforced by federal regulation, and repeatedly invoked by the State Department in the conduct of this nation's foreign affairs — must resort to courts of the state whose officials have perpetrated the treaty violation.

The consular notice provisions of Article 36 confer rights that both the United States and amici view as being of the highest order. The Fourth Circuit's decision, closing the doors of the federal courts to sovereign nations complaining of Article 36 violations, effectively sanctions recurring violations of the Vienna

Convention that threaten to undermine its continuing vitality. The decision below, viewed in light of the reciprocal nature of Article 36 and its fundamental significance for the conduct of foreign relations, therefore raises "important question[s] of federal law that [have] not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Amici accordingly urge this Court to grant Paraguay's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

DATED: Los Angeles, California
March 26, 1998

Respectfully submitted,

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Annex MG 49

AFFIDAVIT OF SCHARLETTE HOLDMAN

DECLARATION OF SCHARLETTE HOLDMAN, PH.D.

I, Scharlette Holdman, declare as follows:

1. I am a Mitigation Specialist with the Center for Capital Assistance [CCA], a non-profit organization providing legal assistance to court-appointed counsel in capital cases involving indigent defendants. CCA's staff routinely investigates and develops evidence for presentation in penalty phases and sentencing hearings of capital trials. We also investigate and develop evidence related to innocence, relative culpability, reliability of statements and confessions, and mental health claims, including mental status at the time of the offense and competency at various stages of capital proceedings.

2. I have twenty years of experience in assisting counsel in capital trials and post-conviction proceedings, in determining the scope of investigation necessary for preparation and presentation of mitigation and other mental health claims, in developing evidence for penalty phase (or sentencing) proceedings, and in providing mental health and mitigation experts the kind of materials they routinely rely upon in their professions in order to offer reliable expert opinions.

3. I have served as a faculty member in numerous CLE-approved training seminars for capital litigation sponsored by the American Bar Association, state bar associations, state and federal public defenders, professional associations, and colleges of law in Arizona and other states, including: Alabama, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Washington and Virginia.

4. From 1978 to 1985, I was Executive Director of the Florida Clearinghouse on Criminal Justice and directed a state-wide program for recruiting, training and assisting appointed and pro bono attorneys in developing and presenting penalty phase evidence in capital cases. In 1985, Florida's legislature recognized the need for trained counsel in capital cases and created the nation's first state agency whose sole

responsibility was to provide counsel in post-conviction capital proceedings. I served as that agency's Chief Investigator and designed and directed the agency's mitigation program, selecting, training, and supervising a staff of ten mitigation specialists and investigators.

5. In 1990, I joined the staff of the California Appellate Project, where I served as Mitigation Specialist and supervised 20 Thurgood Marshall Investigator Interns who assisted court-appointed counsel in capital cases in identifying, developing and presenting mitigation evidence. In each of my positions, my responsibilities also included identifying and developing mitigation evidence for individual capital cases.

6. At the request of current counsel for Walter B. Lagrand, I and my staff have reviewed the Third Petition For Postconviction Relief, currently pending in the Superior Court of Pima County, as well as a very limited summary of testimony presented at Mr. Lagrand's 1984 sentencing hearing, and preliminary information about Mr. Lagrand's life history. We reviewed this information to determine what investigation must be conducted to properly identify and develop mitigation evidence that was available and should have been presented to the sentencing court at the time of trial.

7. The standard of care in capital cases in state and federal courts requires that an in-depth investigation be conducted to develop a reliable social history, including all factors -- familial, medical, psychiatric, cultural, institutional -- which shaped and influenced Mr. Lagrand's cognitive and emotional development and influenced his behavior and functioning as an adult. That social history is the first step in preparing for the penalty phase of a capital trial, without which counsel can not determine the range of mitigation available for presentation. That history is also necessary to allow competent counsel to anticipate, rebut and/or mitigate evidence offered by the prosecution in aggravation. Failure to conduct that investigation and obtain that history falls below any standard of practice.

8. The materials provided include reports and documents regarding Walter Lagrand's parentage, his early childhood in Germany, profound physical neglect necessitating intervention by state agencies, repeated physical illnesses and hospitalizations, early institutional and foster placements, subsequent returns to his hostile mother (when she would accept them back), frequent upheavals as they moved between various parts of Germany and the United States, and brutal maltreatment of Walter and his siblings at the hands of their step-father, both in Arizona and upon returning to Germany. These documents are incomplete. Nonetheless, even these few records indicate that powerful and compelling mitigation evidence was available to counsel in 1984, and that it included a range of issues which have repeatedly been recognized by state and federal courts.

9. Failure to meet that standard establishes a post-conviction claim which is only rendered possible when supported by the same evidence which should have been, but was not, offered at sentencing. Thus, competent post-conviction counsel must scrutinize trial counsel's investigation and representation to ensure that his/her client was provided a constitutionally competent defense. It is my understanding that after Walter Lagrand was convicted and sentenced to death, trial counsel remained as counsel through his state appeal and all post-conviction proceedings. It is therefore not surprising that his blatant omissions and failures at trial were not raised in subsequent proceedings. What is surprising is that he was permitted to continue his representation up until late last week, less than one week before Walter Lagrand is scheduled to be executed.

10. The same standard requires that the mitigation investigation be based on methods of data collection that are accepted in both the legal and medical communities. The data must be competent, reliable and valid evidence. An accurate social history must be supported by independently gathered evidence from as many divergent sources as possible.

11. A social history, or any clinical evaluation, based solely on the self-reports of the defendant is critically unreliable. Collateral evidence obtained from health care providers, social service agencies, law enforcement, official records, and the observations of family, friends, neighbors, employers, caretakers and teachers usually exists to support valid mitigation claims. One of the most critical aspects of the investigation is to locate and interview family members, all known caretakers, peers, health care providers, clergy, and others who knew the individual and his family at critical developmental periods. As part of a competent investigation, this evidence must be obtained, analyzed, and viewed in context with data and records obtained from other sources.

12. Only with properly and independently gathered data can mental health professionals assess: (1) the presence and effect of medical, psychiatric and developmental disorders; and (2) the role of critical social, emotional and other factors, including pivotal life experiences, and their effect of the individual's mental state and behavior at critical points relevant to the charges and subsequent legal proceedings. The necessity of detailed and independent data is exponentially increased in a case, such as this, in which brothers – with inherently competing interests, overwhelming emotional conflicts, and potentially insurmountable pressures – are on trial for their lives in one courtroom.

13. It appears that no such history was ever prepared, nor was any meaningful investigation conducted on behalf of Walter Lagrand, despite obvious indicators of truly significant mitigators: a violent and chaotic childhood, cultural and racial isolation and disenfranchisement, documented early neglect so profound that the Lagrand children were repeatedly hospitalized for malnutrition and criminal charges filed against their caretaker, institutionalization for periods of months and years following repeated abandonment by both parents, and years of brutal treatment by their later step-father, a recently-returned Viet Nam veteran whose war-time experiences and chronic alcoholism resulted in extreme and unpredictable violence toward both his wife and his unwanted

step-children. Although the hearing transcript indicates that a few isolated facts were identified, they were incomplete, unsupported by reliable collateral evidence, and never put in context by appropriate experts.

14. This is seen, for example, in the vast and complex cultural/racial obstacles faced by the Lagrand siblings. These three children were, in effect, socially identified as being from three races, all of them alien to the culture (Germany) in which they lived. They had different fathers, none of whom were present, and raised in an inter-racial household by an unwed mother in a society where racism and nationalism were profound and pervasive. Nonetheless, trial counsel failed to locate or interview either of Mr. Lagrand's parents, nor did he provide an expert to discuss the implications of cultural isolation and racial disenfranchisement, and the effects on the social and psychological development of the Lagrand children. Indeed, the only witness who alluded to this issue at all was Dr. Meshorer, who testified *not* for Walter Lagrand, but on behalf of Walter's brother and co-defendant, Karl Lagrand.

15. Walter Lagrand was born to a German woman, Emma Gebel, in a German hospital, aided by a mid-wife whose name was known. The birth records were never obtained, nor was any effort made to locate the mid-wife, Ms. Gebel's family, or anyone who knew her during and after her pregnancy. I am informed that, at the time of trial and for several years thereafter, counsel was not even aware that his client was a German citizen.

16. Mr. Lagrand was the second of three children, all by different fathers. No attempt was made by counsel to locate any of these men or their families. Walter's father was Tirso Molina-Lopez, an American soldier of Puerto Rican descent. No attempt was made to locate Mr. Molina-Lopez or investigate his background. Thus, counsel had no information about the medical, cognitive or psychiatric vulnerabilities of his client, nor did he obtain any information concerning the relationship between Walter Lagrand's parents, or the effects on young children known to be illegitimate, fatherless,

and racially disparate. (Walter's half-brother's father was African-American; his half-sister's father was German.) In the past days, new counsel has apparently located and interviewed Mr. Molina-Lopez and learned critical information about both Walter Lagrand and his mother, including the fact that Emma Gebel drank alcohol throughout her pregnancy.

17. Newly-obtained records show that Walter was abandoned to a grandmother immediately following his birth, and that he and his siblings were hospitalized repeatedly beginning when he was approximately four months old. They were diagnosed with "nutritional dystrophy," caused by neglect. Malnutrition requiring hospitalization, especially at such early stages of development, often has profound and irreversible consequences, impeding both physical development and cognitive functioning in later life. Before his first birthday, Walter was again hospitalized for the same condition, this time for several months. Between hospitalizations, he was in the custody of his maternal grandmother. Social service records describe her as "harsh and rough with the children." They were eventually removed from her care upon the recommendations of a welfare caseworker.

18. Trial counsel did not locate or interview the caseworker or any of the treating doctors or social service workers, nor did he request records from any of the facilities or agencies involved. Failure to conduct even these minimal inquiries is inexcusable. Without the information contained in these documents, and known to these and other individuals, information obtained from later periods in Walter's life would be without context, and even competent mental health professionals would be severely hampered in their attempts to accurately assess his behavior and abilities. Also critical to this case, far moreso than in most, would be a thorough understanding of the family's experiences and dynamics among the siblings, who not only sustained common (and likely horrifying) experiences as children, but also suffered prolonged periods of separation and conflict. Trial counsel failed to investigate that history, even though

Walter Lagrand's brother was also the co-defendant who sought to place responsibility on Walter for his own criminal behavior. The names of the individuals and the institutions were known, or could easily have been determined, by trial counsel. Indeed, since the appointment of current counsel less than a week ago, several witnesses have been located and interviewed, and institutional records located, many of which are apparently being shipped this week.

19. According to documents we have reviewed, current counsel for Mr. Lagrand was appointed on February 26, 1999. To my knowledge, they are the first independent counsel appointed to investigate and raise claims arising from trial counsel's performance. Newly-appointed counsel must now conduct the in-depth investigation that should have been done pre-trial. From the documents that I have reviewed and our conversations with counsel, it is clear that their investigation commenced immediately upon their appointment. Already, a range of critical witnesses have been located, and significant new facts have been revealed. Despite the passage of so many years, new counsel has apparently located documents from Mr. Lagrand's early childhood. I am informed that arrangements are also underway to interview critical witnesses. However, despite the best efforts of any counsel, a proper post-conviction investigation simply can not be conducted in a week's time. Regardless of their diligence, and regardless of the facts revealed during these preliminary inquiries, it is simply impossible to investigate, identify, document, and raise new legal claims prior to Mr. Lagrand's scheduled execution. I know of no competent mitigation specialist, investigator, or post-conviction counsel who would claim otherwise.

I declare under penalty of perjury under the laws of the United States of America and the State of Arizona that the foregoing is true and correct and that this declaration was signed this 2nd day of March, 1999.

SCHARLETTE HOLDMAN, PH.D.

Annex MG 50

AFFIDAVIT OF ROBERT HIRSH

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Pima)

I, Robert J. Hirsh, upon my oath, depose and state as follows:

1. **That I am licensed to practice in the state of Arizona and have been practicing criminal law in the state of Arizona for over 34 years;**

2. **That I am certified as a specialist in criminal law by the State Bar Association;**

3. **That my practice has consisted almost exclusively of criminal law and I have practiced extensively in state and federal courts in Tucson;**

4. **That I have represented numerous individuals charged with first degree murder and tried many such cases, several of them being potential capital cases;**

5. **That I have represented numerous capital defendants in state court Rule 32 proceedings and federal habeas proceedings, both at the trial court and appellate level;**

6. **That I have been qualified as an expert witness on issues relating to effective assistance of counsel in both state and federal courts;**

7. **That in 1994, I was consulted by attorneys for Carl LeGrand to review the LeGrand file in order to make an assessment of whether Carl LeGrand had been afforded effective assistance of counsel. At that time I became familiar with the proceedings as they related to Walter LeGrand.**

8. **That at the request of the federal public defender, I have reviewed materials relating to the sentencing of Walter LeGrand on September 17, 1984;**

9. **Based on the materials available, I believe and therefore aver that Walter LeGrand's counsel at sentencing, Bruce Burke, was ineffective at Mr. LeGrand's sentencing and fell below the minimum standard required of defense counsel at a capital sentencing;**

10. In connection with the foregoing, Mr. Burke failed to have his client fully evaluated by a mental health professional prior to sentencing. Such examination should have included an opportunity for the mental health professional to review psychiatric records, pertinent police and investigative reports and additional collateral information relating to the defendant's behavior at the time the act occurred. In the instant case, Burke called Dr. David Gurland to testify at sentencing. Gurland had interviewed the defendant the year before for one hour. He had no prior psychological or psychiatric records and no police reports relating to the instant case. The purpose of Gurland's interview was for a pre-Rule 11 screening only. From the record it appeared that Gurland had little information about the offense for which the defendant was convicted;

11. Defense counsel was aware prior to sentencing that defendant had been raised in a dysfunctional family; that the defendant's upbringing was chaotic and that defendant had been physically abused early in life. Despite the indicia of defendant's mental illness, there appeared to be little attempt to psychiatrically explain the defendant's behavior at the time of the commission of the offense. Gurland's only statement as to a psychiatric assessment of the defendant was that the defendant did not appear to be psychotic at the time Gurland saw him;

12. Serious family dysfunction where the defendant has acted out as a juvenile are clearly suggestive of serious underlying mental problems. Defense counsel minimally should have had defendant re-evaluated prior to sentencing under circumstances where a psychiatrist has a full and complete understanding of the defendant's background and behavior. This would require the defense counsel to provide the psychiatrist with all available information about the case, as well as all behavioral and psychiatric records relating to defendant. Further, such a process would require defense counsel to confer with the psychiatrist about these issues prior to testifying. Based on the foregoing, it is my opinion that Bruce Burke fell below the standard of practice required of defense counsel at capital sentencing.

13. In addition to the foregoing, I note that defense counsel called only one other collateral witness, the defendant's sister, to provide further collateral information as to defendant's dysfunctional upbringing. Other witnesses were available to address this issue, as were substantial collateral records relating to the defendant's commitment to foster homes and placement at state institutions. All of the foregoing would have supported psychiatric

testimony. Based on defense counsel's failure to provide this information to the court, Bruce Burke fell below the standard of practice that is required of defense counsel at a capital sentencing.

Affiant further sayeth not.

DATED this 3rd day of March, 1999.

Robert J. Hirsh

SUBSCRIBED AND SWORN TO before me this 3rd day of March, 1999.

Notary Public

My Commission Expires:

June 5, 2000

Annex MG 51

SUPERIOR COURT OF THE STATE OF ARIZONA,
COUNTY OF PIMA,
STATE OF ARIZONA V. *WALTER LAGRAND*,
THIRD PETITION FOR POSTCONVICTION RELIEF
(2 MARCH 1999)

COPY
MAR 2 1999
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

Julie S. Hall, Bar # 017252
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Tucson, Arizona 85701
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Counsel for Petitioner

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,) No. CR-07426
)
)
Respondent,) THIRD PETITION FOR
v.) POSTCONVICTION RELIEF
)
)
WALTER B. LAGRAND,)
)
)
) **EXECUTION SCHEDULED**
Petitioner.) **March 3, 1999**
)

Walter LaGrand is scheduled to die on March 3 for a murder committed by his brother seventeen years ago. Compelling evidence demonstrating that Petitioner's death sentence is unconstitutional exists which has never been considered by any court because Walter's trial attorney[1] failed to investigate and discover this evidence. Walter LaGrand has never had the opportunity to challenge the effectiveness of his lawyer at his capital trial, sentencing, and direct appeal because his attorney–the same attorney who rendered ineffective assistance of counsel–

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[1] To avoid confusion, Bruce Burke, who represented Walter at trial, sentencing, appeal, state and federal postconviction, and in these proceedings, will be referred to throughout these pleadings as "trial counsel."

remained his counsel of record throughout state and federal court.[2] Unless this court takes action, Walter will die having never received a fair hearing in any court on the most important issue in his case: the ineffectiveness of his trial, sentencing, and appeal counsel.

FACTS[3]

Petitioner was born on January 26, 1962, the second child of Emma Gebel.[4] His name at birth was Walter Bernhard Gebel. His mother was twenty years old. She had given birth two years earlier to Walter's half-sister, Petra Christine Gebel. Walter's half-brother, Karl Heinz Gebel, was born the year after Walter, on October 10, 1963. Emma Gebel did not marry any of the biological father's of her children. None of her children have ever met their biological father.

Walter's father, Tirso Molina-Lopez, was an American soldier stationed in Augsburg, Germany.[5] Emma met him in restaurant in Augsburg in April of 1961. She became pregnant immediately. Tirso Molina-Lopez left Germany in August of 1961. He has not been heard from since. Walter's trial counsel has made no attempt to locate, interview, or investigate the whereabouts and history of Mr. Molina-Lopez.

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[2] Respondents assertion in other pleadings that Petitioner received a hearing on his ineffective assistance of counsel claim in federal court is patently false.

[3] Some facts set forth in this petition are supported by documents which are en route to counsel and will be filed with the Court as soon as they are received. Undersigned counsel was appointed February 26, 1999. Investigation was immediately undertaken but is obviously not complete. Petitioner will move to supplement this pleading as additional facts supporting these claims are uncovered.

[4] Walter was born at St. Elisabeth Hospital in Dillingen on the Danube, Germany. The birth was attended by a Midwife named Mrs. Teichman. Walter's trial attorney never obtained his birth certificate or birth records. Nor has Mrs Teichman been located and interviewed. Trial counsel did not even know that his client was a German citizen when he represented him at his capital trial, sentencing and appeal.

[5] Information Protocol for the Purpose of Filiation, by Ros Ruder, dated February 28, 1962. Counsel did not locate or interview Ros Ruder.

Walter's mother abandoned him to the care of her mother (Walter's grandmother), Maria Gebel, immediately upon his birth. Walter's grandmother was already caring for three other infant grandchildren, Petra Christine (Walter's half-sister), Renate Gebel (Walter's cousin), and Michael Gebel (Walter's cousin). Renate and Michael were the children of Anna Gebel, Emma's sister. Like Emma Gebel, Anna did not marry the father of her two children and abandoned them to the care of their grandmother, Maria.

Maria could not care for the babies. A welfare department report completed when Walter was just three months of age describes Maria as "harsh and rough with the children." [Report Sheet Re: Visit to Ward, author I. Große (caseworker), April 3, 1962][6]. At the time of this visit, Große described the conditions of the home as "bearable." Große also notes that an older man is present who is "in on everything."[7]

One month later, Walter was hospitalized. [Report Sheet Re: Visit to Ward, author I. Große , May 16, 1962]. The report does not state why Walter was in the hospital.[8] Große notes that "The Youth Office is well aware of the domestic circumstances."[9] [Id.] Walter's mother only rarely sent money to Maria. [Id.]. Walter was returned to his grandmother's care upon discharge from the hospital.

Seven months later, Walter was hospitalized again. This time, his sister and two cousins were hospitalized as well-all due to "nutritional dystrophy" and neglect.[10] The children were admitted to Dillingen Hospital on December 19, 1962. The next day, on December 20, 1962, the children were transferred to Josefinum Children's Hospital in Augsburg where they remained until February 21, 1963. Doctor Freislederer at Josefinum Children's Hospital wrote that the grandmother's home was "unfavorable."[11] [Report of Caseworker Tiefenbacher, dated 1/18/63].[12] The doctor reported that neither the mother nor the grandmother could provide adequate care for the children. The children were lacking in "supervision", "nurture," and "care." The doctor made the following observations: "The children do not get enough to eat."; "The accommodations are extremely poor."; "The children are undernourished."; and "The children appear haggard and sickly." [Id.]

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[6] Trial counsel did not locate or interview caseworker Große.

[7] Trial counsel made no attempts to identify this man or investigate the meaning of this statement.

[8] Trial counsel made no attempts to uncover the reason for the hospitalization.

[9] Trial counsel made no attempts to investigate the meaning of this statement.

The doctor concluded that it was "insupportable and irresponsible" to leave more than two children with the grandmother.[13] The doctor recommended that the children be sent to Allgau, in the Bavarian region so that they could heal from their many physical and emotional ailments. [Id.]

The children were transferred from Josefinum Children's Hospital to Tama Recreation Home at Hindelang in the Bavarian Region on February 21, 1963. They remained there until

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[10] Trial counsel made no attempts to investigate the nature of the term "nutritional dystrophy" in Germany. However, from the context of the report, it appears to mean that these children were not being fed.

[11] Trial counsel made no attempts to locate and interview Dr. Freislederer and has not obtained the records from Josefinum Children's Hospital. Trial counsel did not identify, locate, or interview any of the staff at Josefinum Children's Hospital.

[12] Counsel made no attempt to locate and interview Caseworker Tiefenbacher.

[13] All four children were returned to the grandmother on March 30, 1963.

March 20, 1963.

Upon their discharge from the Tama Recreation Home, Sister March Utsch wrote:

> All four children developed an amazing appetite and became acclimatized to their new environment very quickly. Because of the wonderful winter weather, they were able to be outdoors almost every day and looked very well-rested, when the case worker from Dillingen picked them up. However, there was a heart-wrenching scene, when the four children were put into the car and none of them wanted to leave. They let out ear-splitting screams and tried to get out of the car by pushing against the windows. To console them, I placed a large teddy bear into the car, which took their minds off their departure a bit. ... If you ever get children as wretched as these again – we now have enough room to take them in.

Letter from Sister Martha Utsch to Dr. Freistederer.[14] All four children were returned to their grandmother, Maria.

Karl Heinz LaGrand was born on October 10, 1963. He was immediately placed in a children's home. Petra was three years old, Walter was a year and a half. Karl would not meet his brother and sister until late 1966. At the time of Karl's birth, Emma was living with Xaver Stehle in Augsburg.[15] [See Exhibits 1-20].

Eight months after being discharged from the Tama Recreation Home, Renate Gebel was hospitalized again for nutritional dystrophy. Maria repeatedly requested help from her two daughters because she could not care for the children. [Caseworkers Report, I. Große, dated December 12, 1963]. Neither Emma nor Anna gave her any help.

On January 31, 1994 (five days after Walter's second birthday), the children were placed in a children's home because Maria was unexpectedly hospitalized and the children were left with no one to care for them. Four days later Emma Gebel was contacted by the District Youth Office and told that her children had been placed in a children's home. Emma responded that she wanted the children left there. [See Exhibits 1 through 20].

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[14] Counsel made no attempt to locate and interview Sister Utsch or any of the other nuns at the Tama Recreation Home.

[15] Counsel did not locate or interview Xaver Stehle.

Two stories were told about why Maria was hospitalized. Maria's daughter, Anna, said that her brother (Walter's uncle), Oswald Gebel, came home drunk and beat up their mother.[16] Katharina Matt–Emma and Anna's sister–and Maria deny this story. They explain that Maria somehow broke her hip.[17] [Id.]

Criminal charges were filed against Anna for leaving the children without supervision when Maria was hospitalized.[18] According to Public Guardian Rieder, the children were starving and had inadequate clothes when the social worker, Miss Stetter, went to pick them up. Anna had left the children (the oldest child, Petra, was only three years old) alone in the apartment.[19] [Id.]

On February 17, 1964, all four children (Petra, Renate, Michael and Walter) were placed in the temporary custody of the Social Welfare Department and placed in a children's home. The children stayed in the Children's Home at Wittislingen for two and a half years, from January 31,

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[16] Trial counsel did not locate or interview Oswald Gebel.

[17] Trial counsel did not locate or interview Katharina Matt.

[18] The outcome of criminal charges is not known. Trial counsel did not obtain copies of the court records or police reports relating to this incident. Anna Gebel was not located or interviewed.

[19] Trial counsel did not locate or interview Rieder or Miss Stetter.

1964 until July 27, 1966.[20] In the meantime, Karl was living in a home for infants in Augsburg. The temporary placement order was made permanent on June 25, 1964. [Id.]

On August 12, 1965, Emma requested permission to take Walter and Petra to a United States Military physician, Capt. Hollister S. Harrison.[21] Emma stated that she was to marry Masie Lagrand, an American soldier stationed in Augsburg. Mr. Lagrand intended to marry Emma and adopt her three children. Miss Wirth from the social welfare office accompanied the children to the examination and returned them to the children's home.[22] [Id.]

Seven months later, on March 18, 1966, Emma Gebel married Masie Lagrand. The wedding took place before a magistrate.[23] Three months later, on June 16, 1966, Emma Lagrand sent a letter to the court requesting custody of Petra and Walter. She had already obtained custody of Karl. She wished to take all three of her children to the United States. Her husband Masie intended to adopt the children. Ms. Lagrand signed her name, Anna Lagrand–the name of her sister. [Id.]

On June 20, 1966, a report from the Children's Home described Walter as "full of life", "boisterous", "good-natured", "easy-going", and "generally well-liked by the other children." The Gebel children were "very attached to each other" and "a pleasure to have around." [Id.]

On July 27, 1966, the court entered an order returning custody of Walter and Petra to

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[20] Trial counsel did not obtain records from the children's home, and did not interview any of the workers there.

[21] Trial counsel did not obtain the records from this evaluation and did not locate or interview Dr. Harrison.

[22] Trial counsel did not locate or interview Miss Wirth.

[23] Trial counsel did not obtain the marriage certificate.

Emma Lagrand.[24] On October 19, 1966, the Social Welfare office in Germany closed its file on the Gebel children. [Id.]

Sometime between July, 1966 and January 1967, Masie Lagrand adopted Petra, Walter, and Karl. The family moved to the United States in January of 1967. Walter was almost five years old. [Id.]

Soon after the family was transferred to the United States, Masie Lagrand was ordered to report for duty to fight in Viet Nam.[25] Masie Lagrand's war time experience apparently had a dramatic and tragic effect on him psychologically. After returning from the war, he drank heavily, could not sleep, and had terrible nightmares.[26] Mr. Lagrand was extremely violent. He beat the boys often for minor transgressions. When the boys would run away to escape the terror of their home life, preferring to sleep on park benches, Mr. Lagrand would beat them again.

Masie and Emma's marriage deteriorated significantly and both started having extra marital affairs. This severely unstable and dysfunctional family was under increasing stress when Masie was transferred back to Germany. Emma and the children remained in Arizona. When Mr. Lagrand came home from Germany, he and Emma had difficulties at once, resulting in a violent argument. Mr. Lagrand returned to Germany. Two months later, in December of 1973, Emma took the children to Germany to live with Masie. After they arrived, they found that Masie was living with another woman in Germany and had children from that relationship. Mr. Lagrand continued to beat Walter and Karl in Germany.

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[24] The court order refers to an inquiry into the community regarding Emma Lagrand. Counsel did not attempt to locate or gather records regarding this inquiry.

[25] Masie Lagrand's experiences in Viet Nam are not known because counsel did not attempt to locate or interview him. Counsel did not attempt to obtain Mr. Lagrand's military file.

[26] All of these symptoms are characteristic of Viet Nam Vet's syndrome, now, post traumatic stress disorder.

Six months later, Emma moved back to the United States with her children. She blamed the boys for the demise of her marriage. Mr. Lagrand divorced Emma, claiming that he had never adopted the children. Masie Lagrand had been the only father figure in the children's lives and they were devastated by his rejection of them. Masie Lagrand has not had any contact with the family since this time.

None of these facts have ever been presented in any meaningful way to any court who has considered Walter's case.

ARGUMENT

I. This Petition Is Properly Presented And Must Be Considered On The Merits.

Petitioner has never before had an opportunity to litigate his ineffective assistance of counsel claims. Petitioner was represented at trial and sentencing in his capital case by Bruce Burke. Mr. Burke continued to represent Petitioner throughout the direct appeal and first state postconviction proceedings, throughout all federal habeas corpus proceedings, and has thus far continued to represent Petitioner in his second state postconviction proceeding. At no point was co-counsel appointed to assist Mr. Burke in the representation of Petitioner.

While Petitioner's case was pending in federal district court, that court recognized the serious concerns raised by such continuing representation in a capital case. Only when the court raised these concerns with Mr. Burke was Petitioner informed that the continuing representation was preventing Petitioner from investigating claims that his counsel had been ineffective at trial, during sentencing, and on appeal. Without obtaining for Petitioner the advice of conflict free counsel, Mr. Burke advised Petitioner to reject the district court's offer to appoint new counsel.

Despite the fact that Mr. Burke admitted he could not be objective about his own performance and that Petitioner had no legal training or skills, the court accepted Mr. Burke's sealed status report stating that Petitioner did not want new counsel appointed. The court did not obtain a personal or written waiver from Petitioner, or appoint conflict free counsel to advise him.

When investigation by Petitioner's codefendant, Karl Lagrand, uncovered additional evidence of Karl's attorney's ineffective assistance at sentencing, Mr. Burke learned that his advice to Petitioner was obviously wrong. He moved to withdraw as counsel for Petitioner. The district court unsealed the Status Report filed by Mr. Burke and denied counsel's motion. The Ninth Circuit subsequently affirmed the decision not to appoint new counsel in federal court. No independent inquiry of Petitioner was made by either court.

Petitioner never made a waiver of his right to effective assistance of counsel. Until February 25, 1999, the only person to advise petitioner about his ineffective assistance of counsel claims was Mr. Burke. Mr. Burke had not allowed any other attorney to speak with his client until that time. Mr. Burke has an actual conflict of interest and can not objectively evaluate his services. Petitioner is not skilled in the law and did not understand the nature of his ineffective assistance claims, the consequences of not raising those claims, and the viability of those claims.

On February 25, 1999, Mr. Burke authorized undersigned counsel to meet with petitioner. For the first time, Petitioner had the opportunity to consult with conflict-free counsel. As a result, Petitioner wishes to pursue his claims relating to the ineffective assistance of his prior counsel.

II. Walter Lagrand Received Ineffective Assistance of Counsel at His Capital Trial, Sentencing, and on Direct Appeal

Mr. Burke's numerous errors and omissions in his representation of Walter Lagrand resulted in a denial of Walter Lagrand's rights to effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Arizona Constitution.[27]

The instances of ineffective assistance of counsel include, but are not limited to, failure to adequately investigate evidence of innocence and mitigation supporting a life sentence, and failure to raise meritorious issues at trial and on direct appeal.

Although undersigned counsel was just appointed and investigation into these claims just begun, at least one instance of ineffective assistance of trial and appellate counsel is readily apparent from the record. Trial counsel failed to object to the unconstitutional method of execution imposed at Petitioner's sentencing. On appeal, this same counsel failed to raise that issue as well. In Petitioner's codefendant's case, the Ninth Circuit granted relief on the basis that execution by lethal gas violates the United States Constitution. Lagrand (Karl) v. Stewart, No. 99-99004, Order and Opinion (9Th Cir. February 24, 1999). Petitioner is similarly situated and is entitled to a new sentencing because the execution of his sentence cannot be constitutionally carried out.

Trial Counsel was also ineffective for failing to adequately investigate evidence of Petitioner's actual innocence of the crime and of his capital sentence. Walter Lagrand has always maintained that he was not present when his brother killed the victim. Karl Lagrand's confessions to law enforcement officers and others have consistently confirmed Walter's testimony. However, the courts have thus far rejected Walter and Karl's consistent account that Karl acted alone and impulsively, even though the Arizona Supreme Court recognized that evidence corroborating Karl's confessions certainly exists. State v. Lagrand, 734 P.d. 563, 571 (1987)("Evidence both corroborating and contradicting Karl's statements exists.")

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[27] Undersigned counsel was appointed to represent Petitioner in federal court on February 26, 1999. As a result, counsel has had almost no opportunity to review the record in this case or to conduct any investigation on behalf of Petitioner in the days since their appointment. Even a cursory review of the few available documents in the case demonstrates that meritorious claims of ineffective assistance of counsel exist. Investigation is ongoing and these claims will be supplemented as new facts are discovered.

Walter Lagrand was convicted on a general verdict of first degree murder. It is not known if the jury convicted him of premeditated murder or felony murder. The sentencing court found pecuniary gain and that the murder was especially cruel, heinous, or depraved and that Walter's participation in the crime made him eligible for the death penalty pursuant to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 and Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987).. All of these findings rest on a credibility dispute between Karl Lagrand's confessions coupled with Walter Lagrand's testimony versus the testimony of Dawn Lopez. If the court found that Karl Lagrand acted impulsively and alone then the murder is not premeditated, was not in furtherance of the robbery, was not for pecuniary gain, the mental element necessary for the especially cruel, heinous, and depraved aggravating circumstance was not met, and Walter Lagrand is not even eligible for the death penalty under Enmund/Tison.

Trial counsel was aware of the crucial significance in this testimony. Yet, his only attempt to discredit Dawn Lopez's testimony was to call an expert in the area of the effects of stress on memory. Inexplicably, counsel did not obtain an independent crime scene expert to assist in reviewing the physical evidence. Competent counsel would have conducted an independent investigation to compare the physical evidence with the testimony of Dawn Lopez and Walter Lagrand to demonstrate the veracity of Walter and Karl's version of events. In addition, competent counsel would have investigated Karl's mental health background. Had he done so, he would have learned that Karl did have a character trait for impulsivity which also would have corroborated Walter and Karl. See State v. Christensen, 129 Ariz 32, 35, 628 P.2d 580, 583 (1981). See also State v. Ortiz, 158 Ariz. 528, 533, 764 P.2d 13, 18 (1988)(expert testimony concerning defendant's tendency to act without reflection relevant to first degree murder charge where defendant shot ex-wife several times, then followed her when she crawled under a car, talked to her and shot her again); Vickers v. Ricketts, 798 P.2d 369, 373 (1986)(expert testimony about impulsive behavior caused by temporal lobe epilepsy is probative of lack of premeditation where defendant strangled victim, punctured victim's body a dozen times, and carved "Bonsai" in victim's back); Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995)(trial counsel ineffective for failing to present cogent mental incapacity defense).

Some of this investigation has been conducted since the time of trial, but not by counsel for Walter Lagrand. Investigation is ongoing.

Given sufficient time, undersigned counsel believes evidence will be uncovered which will prove that Karl acted alone and impulsively. This was not a murder in the furtherance of a robbery. The robbery was aborted. This was not a murder for pecuniary gain. The brothers knew they would get no money. Walter did not possess the mental state necessary to establish the especially cruel, heinous, or depraved aggravating circumstance and the mental state of the killer, his brother Karl, cannot be transferred to him. Most importantly, counsel believes that additional investigation will show that the facts do not, and cannot, support the trial court's finding that Walter attempted, intended, or did kill beyond a reasonable doubt. This means that

Walter is not even eligible for the death penalty.

Petitioner was prejudiced by his trial counsel's ineffectiveness and inability to adequately confront the state's case, and establish that he did not premeditate or intend to kill the victim, and that his brother Karl who was tried jointly with him did not premeditate the crime or intend to kill the victim. See e.g., State v. Christensen, 12 Ariz. At 33-34, 628 P.2d at 581-82 (expert testimony of impulsivity should have been admitted where defendant confessed to killing wife, stated that he hit her after heated argument with bottle, laid down next to her for "an undetermined time," and "choked her with his hands"; victim's body found under bed had sustained two severe head wounds, numerous small abrasions and lacerations and had ligature of twine around her neck); State v. Lacquey, 117 Ariz. 231, 571 P.2d 1027, 1030 (1977)(because death of victim who was bruised all over chest, back, legs and thighs, strangled, sustained nine fractured ribs, lacerated liver and hemorrhaged brain was result of "random violent and indiscriminate attack upon victim" and not premeditation, first degree murder reduced to second degree murder).

Petitioner's court appointed counsel's failure to effectively represent him regarding these issues denied him his rights under the Sixth, Eighth, and Fourteenth Amendments.

Trial counsel was also ineffective because he failed to properly investigate substantial and compelling evidence supporting a life sentence and did not properly attack the aggravating circumstances. Counsel in a capital case has an obligation to investigate his client's background, character, and circumstances of the crime. Here, no meaningful mitigation investigation was conducted. The mental health "evaluation" conducted by Dr. Gurland consisted of a one-hour interview of Walter Lagrand and a review of presentence reports. Dr. Gurland did not have any collateral source information. Dr. Gurland was in no position to offer meaningful testimony to the court. Although counsel called Petitioner's sister to testify, she could not provide many of the relevant material facts because she was too young to recall the events.

The evidence outlined above is evidence which should have been discovered during the pretrial investigation in this case, and is but a glimpse into the severely dysfunctional and abusive family into which Walter was born and raised.[28] Competent counsel in a capital trial would have conducted an adequate investigation. This evidence is relevant because trauma experienced during childhood leads to crippling lifelong mental instabilities which often lead to unfortunate tragedies such as the one here. State v. Trostle, 951 P. 2d 869 (AZ. 1997). Evidence that Walter suffered from malnutrition, isolation, neglect, and torture throughout his childhood are all relevant to a proper determination of the sentence. In addition, counsel's failure to produce any evidence relevant to Walter's positive character traits, e.g., the fact that he was a loving, boisterous child who was a pleasure to be around, constitutes ineffective assistance of counsel.

All of this evidence is needed to obtain an accurate mental health profile of the person being sentenced. The evidence uncovered shows a very different picture of Walter Lagrand.

Critical investigation has never been conducted because of the continued representation by trial counsel whose representation is being challenged. The evidence in this petition alone is sufficient to grant a stay of execution. However, this evidence only scratches the surface. Counsel has not had time to conduct any but the most minimal investigation in this case. Given additional time, counsel believes that even more evidence establishing Petitioner's innocence of the first degree murder charge and capital sentence will be uncovered. Petitioner's execution must be stopped.

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[28] As late as last week counsel did not even know some of the basic facts about his clients life history. For example, in the second post conviction petition, Mr. Burke proffers that his client's biological father was black and that as a teenager he had a blonde afro. Walter Lagrand's father was Puerto-Rican. Walter Lagrand has black hair.

Petitioner was prejudiced by counsel's ineffectiveness because he received a death sentence when the presentation of the readily available evidence would have rebutted the aggravating circumstances, and established mitigating evidence warranting a life sentence. Counsel's failure to conduct a proper investigation of Petitioner's background and social history not only precluded the presentation of this evidence as independent mitigation, it also compromised the ability of his, and the State's mental health experts to make competent and accurate diagnoses. Caro v. Calderon, 1999 WL 6573 (1999); Hendricks v. Calderon, 70 F.3d 1031, 1044 (9th Cir. 1995); Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994).

Trial counsel was also ineffective for failing to raise the Vienna Convention issue at trial or on direct appeal. Trial counsel did not even know that his client was a German citizen for the first ten years that he represented him. Walter Lagrand had no way of knowing that his German citizenship was of any relevance to the proceeding. Had Mr. Lagrand been informed of his rights under the Vienna Convention, the German Government would have become involved in the investigation of his case and assisted counsel in uncovering the important evidence outlined above and in conducting the additional necessary investigation which has yet to be performed. Trial counsel's failure to raise this claim at trial and on appeal resulted in a finding of preclusion on these claims which may prevent this Court from a review of this claim on the merits.

Trial counsel's professional errors prejudiced petitioner. Evidence relating to his innocence of the crime and his capital sentence have never been presented. Petitioner was prejudiced as a result. Trial counsel failed to raise a meritorious claim that execution by lethal gas is unconstitutional and as a result, Petitioner is about to be executed in an unconstitutionally cruel and unusual manner. Given additional time–more than the two days afforded undersigned counsel–other substantial constitutional errors will be uncovered. This court must act now to prevent this grave injustice.

III. Counsel Must Be Appointed to Investigate and Amend This Petition

Petitioner needs counsel who can ethically represent him at this stage of the proceedings. Petitioner has been incarcerated on Arizona's death row since 1984. He has no legal training. He is incapable of conducting the factual and legal investigation and research necessary to proving ineffective assistance of trial, sentencing, and direct appeal counsel. As the United States Supreme Court recognizes, a person untrained in the law is generally unable to evaluate their counsel's performance. Kimmelman v. Morrison, 477 U.S. 365 (1986). Thus, it is not surprising that criminal defendants usually are unaware that they have received ineffective assistance until they have consulted with a different lawyer. Id; United States v. Cronic, 466 U.S. 648, 657 n.21 (1984)(because the constitutional standard of effectiveness is focused on the adversarial process, "we attach no weight to either [the client's] expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction"). Until February 25, 1999, Petitioner has never had the opportunity to consult with a lawyer other than Mr. Burke about Mr. Burke's representation. Prior to that time, Petitioner could not have evaluated the quality of Mr. Burke's representation because he had no legal advice from an attorney who could ethically advise him regarding issues of ineffective assistance of counsel and he had no ability to research and investigate those issues himself. In fact, Mr. Burke told

Petitioner that he knew of nothing that would support a claim of ineffectiveness. Lagrand v. Lewis, No. CIV 92-217-TUC-WDB, Status Report (D.Ariz. May 15, 1992).

Mr. Burke could not and cannot challenge his own effectiveness. State v. Marlow, 163 Ariz. 65, 68, 786 P.d. 395, 398 (1989). Mr. Burke candidly admitted to the district court in his motion to withdraw that his judgment in advising Petitioner to waive the appointment of independent counsel in federal court was prejudiced by the conflict under which he operates. Arizona recognizes that such a conflict is impermissible, even in noncapital cases. State v. Suarez, 137 Ariz. 368, 670 P.d. 1192 (App. 1983). The Ninth Circuit agrees. Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1994).

Under these extraordinary circumstances, the appropriate remedy is to stay the execution and appoint new counsel to represent Petitioner. Because Petitioner's counsel is unable to represent him at this stage of proceedings, Petitioner is currently without counsel. In capital cases in which a defendant has never had conflict free counsel but, after consulting with conflict free counsel for the first time, expresses his intent to raise a claim of ineffective assistance of counsel, this Court must act to protect defendant's important right to the effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution. See State v. Greenawalt, No. CR-79-4616-AP, Order, January 14, 1993 (because "issue of ineffective assistance of counsel has not previously been raised in this case" and new counsel has been appointed, stay of execution granted); State v. Carriger, No. CR-82-4457-AP/PC, Order, October 20, 1993 (in petition raising claim of ineffective assistance of counsel at sentencing for first time, stay granted to permit completion of Rule 32 proceedings); see also State v. Walton, 159 Ariz. 571, 591, 769 P.d. 1017, 1037 (1989)(where ineffective assistance claim will be raised, court should appoint new counsel for subsequent proceedings).

Petitioner must now be represented by counsel who can "objectively review" and "zealously argue" a claim of ineffective assistance of counsel. See Suarez, at 380, 670 P.d. at 1204.

CONCLUSION

For the foregoing reasons and on the basis of the facts and authorities cited, the amended petition for postconviction relief should be granted and Petitioner's death sentence should be vacated. Alternatively, the petition should be stayed and sufficient time allowed undersigned counsel to investigate these substantial claims that could not have been investigated before.

Respectfully submitted this 2nd day of March, 1999.

Julie S. Hall
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Copy of the foregoing faxed
this 2nd day of March, 1999 to:

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Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007
Fax (602) 542-4849

EXHIBIT 1

Affidavit

The undersigned certifies herewith, that the foregoing document is an accurate and equivalent translation from the German-language original, to the best of her knowledge and ability.

Karin Isbell, 12/14/94

Karin Isbell, M.A.
Court Interpreter & Translator
Accredited Member,
American Translators Association
Member, Arizona Court Interpreters Assoc.

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss.
This instrument was acknowledged before me this 14th day of
[illegible] by Karin Isbell
In witness whereof I hereunto set my hand and official seal.
[illegible] NOTARY PUBLIC
My commission expires [illegible]

Affidavit

The undersigned certifies herewith, that the foregoing document is an accurate and equivalent translation from the German-language original, to the best of her knowledge and ability.

Karin Isbell 2/28/94
Karin Isbell, M.A.
Court Interpreter & Translator
Accredited Member,
American Translators Association
Member, Arizona Court Interpreters Assoc.

STATE OF ARIZONA }ss.
COUNTY OF MARICOPA
The instrument was acknowledged before me this 28 day of
Feb. 1994, Karin Isbell
In witness whereof, I hereunto set my hand and official seal.
NOTARY PUBLIC
My Commission Expires July 31, 1996